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THE DEVELOPMENT OF GERMAN PRIZE LAW.

It is the purpose of the present article to consider some of the more important of the decisions of the German Prize Courts,[1] taking up the various topics substantially in the order of the articles of the Prize Code, which in turn follows the order of presentation in the Declaration of London. The principal amendments to the Prize Code promulgated up to April 17, 1918, will also be noted, as well as the views announced in late works and articles on this topic.

Since the formation of the German Empire there has been no legislative enactment upon the subject of prize law, except the Law of May 3, 1884.[2] The Law of 1884 provides:

> Art. 1. The decision in regard to the legality of a capture in war is to be rendered by specially constituted tribunals (prize courts).
> Art. 2. The place of sitting and composition of prize courts, the procedure in cases brought before them, and the duties imposed on other administrative authorities, imperial as well as state, in respect of their cooperation with such courts, will be determined by imperial ordinance.

[1]The cases are herein cited by date. A number of cases are published in full in the Hanseatische Gerichtszeitung, in the Zeitschrift für Völkerrecht, and in Niemeyer's Zeitschrift für internationales Recht. Excerpts from decisions are published in the Deutsche Juristen Zeitung, in Recht, and in the Leipziger Zeitschrift für deutsches Recht. The decisions in the cases of The Fenix, The Elida, The Glitra, The Maria, The Indian Prince, and The Appam are published in an English translation (herein made use of by the courtesy of the publishers) in the American Journal of International Law; the decisions in The Medea, The Batavier V, The Elida, The Maria and The Primavera are published in a French translation in Clunet's Journal du droit international. A number of the decisions have also been published in English in Lloyd's List and in an Italian translation in the Rivista di diritto internazionale. Some of the decisions affecting Dutch interests are published from time to time in the Netherlands Orange Books and in Grotius, Annuaire de droit international. A digest of the current decisions is published in International Law Notes (London).

[2]Reichsgesetzblatt (1884) 49.

The Prize Code (*Prisenordnung*) of September 30, 1909,[3] and the Prize Courts Ordinance (*Prisengerichtsordnung*) of April 15, 1911,[4] were promulgated on August 3, 1914.

Procedure is regulated by the Prize Procedure Ordinance of April 15, 1911, as amended. The preliminary proceedings take place before a prize board (*Prisenamt*). Two prize courts are created, one having its seat at Hamburg, the other at Kiel. The prize court consists of five judges, of whom the president and one member must be of the legal profession. The remainder of the court is composed of a naval officer and two laymen, representing respectively the shipping and commercial interests. The government is represented by an imperial commissioner. The owner of the ship or cargo, and other persons interested, have the right to appear as claimants, either in person or by attorney. Alien enemies have the same right to appear or be represented as other persons. If no claim is interposed, the court proceeds to a determination of the case on the basis of the claim submitted by the imperial commissioner. An appeal lies from the prize courts to the Superior Court of Prize (*Oberprisengericht*) in Berlin. This appellate court consists of seven judges, of whom three belong to the legal profession, one is a naval officer, one a representative of the Ministry for Foreign Affairs, and two are lay judges. Proceedings in all the courts are public.[5]

The Prize Code of September 30, 1909, has been amended by the Proclamations of October 18, 1914,[6] November 23, 1914,[7] and December 14, 1914,[8] amending the contraband lists. These proclamations were incorporated in and superseded by the Ordinance of April 18, 1915,[9] which makes sweeping changes in the lists of absolute and conditional contraband, and amends arts. 33, 35 and 40, so as to assimilate the German law relating to the carrying of contraband to the English law on these points. The lists of contraband were again amended by the Ordinances of May 31, 1916,[10]

[3]Reichsgesetzblatt (1914) 275.

[4]Reichsgesetzblatt (1914) 301.

[5]Huberich and King, Emergency Legislation of Germany, Part IV, Prize Law, 59 Solicitors' Journal 70 *et seq.*; Huberich and King, German Prize Code XVI-XVII.

[6]Reichsgesetzblatt (1914) 441.

[7]Reichsgesetzblatt (1914) 481.

[8]Reichsgesetzblatt (1914) 509.

[9]Reichsgesetzblatt (1915) 227.

[10]Reichsgesetzblatt (1916) 437.

June 25, 1917,[11] and January 18, 1918.[12] Further important changes were made by the Ordinances of July 22, 1916,[13] regarding presumption of hostile destination, and of July 16, 1917,[14] regarding enemy character.

LEGAL NATURE OF THE PRIZE CODE.

Art. 1 of the Prize Code provides:

> During a war the commanders of H. M. ships of war have the right to stop and search enemy and neutral merchant vessels, and to seize—and, in exceptional cases, to destroy—the same, together with the enemy and neutral goods found thereon.

The Prize Procedure Ordinance specifically provides that it is issued in pursuance of the Law of May 3, 1884, but there is no corresponding reference in the enacting clause of the Prize Code. The Prize Code is, in form, not a law. It was issued by the Emperor, who states in the introductory clause:

> I approve the following Prize Code and decree that the commanders of my navy shall proceed in accordance therewith in applying the right of prize.

Is the Prize Code a law or is it merely a set of instructions to naval commanders? The question is one of considerable practical importance. Upon its answer depends the question as to the binding force of the provisions of the Prize Code relating to the payment of damages.[15]

The question is not a new one in German jurisprudence. During the war against Denmark, an ordinance was issued in Prussia under date of June 20, 1864.[16] There was no legislative enactment expressly authorizing the promulgation of such an ordinance, and the government based its right to issue the same on the crown prerogative. By a small majority, the Prussian House of Representatives declared the ordinance invalid, especially because it provided for judicial procedure, a matter which, under the constitution, was exclusively within the scope of the legislative power.

[11] Reichsgesetzblatt (1917) 554. See Appendix.

[12] Reichsgesetzblatt (1918) 43.

[13] Reichsgesetzblatt (1916) 773, more fully noted below.

[14] Reichsgesetzblatt (1917) 631, more fully noted below.

[15] Heilfron, Der Lusitaniafall, Juristische Wochenschrift (1915) 486.

[16] Preussisches Gesetzblatt (1864) 369. The Ordinance was published on 16th July, 1864. For a summary of its provisions see Huberich and King, German Prize Code IX-XII.

The government conceded merely its inability to prescribe the procedure before the ordinary courts, and modern writers regard the Ordinance of 1864 as supportable only as instructions issued by the military powers, and not as a law.[17]

As to the legal nature of the present Prize Code, a great diversity of opinion exists among the authorities. Heilfron[18] regards it merely as a set of instructions issued by the Emperor as commander-in-chief of the navy. Rissom[19] views it as a collection of rules of substantive law, while Heymann[20] and Rehm[21] attribute to it a mixed character, partly a set of rules for the guidance of naval officers, partly a set of rules of substantive law. Meene[22] regards it as a set of instructions, and not as a source of law, though of importance as indicating the correct rule to be applied by the courts.

In regard to this point, the Superior Court of Prize says, in *The Elida*:[23]

> The Prize Code contains the principles laid down by the Emperor as commander-in-chief within his imperial jurisdiction for the practice of prize law pertaining to naval warfare, and is, therefore, primarily law not only for the navy but also for the inland authorities, particularly the prize courts, in so far as they have to pass upon the legality of the actions of commanders at sea falling within the prize law.

The question is more fully discussed by the Hamburg Prize Court in *The Zaanstroom*:[24]

> The German law of prize is contained in the Prize Code of September 30, 1909 [*Reichsgesetzblatt* (1914) 275 *et seq.*] which in its contents is substantially identical with the Declaration of London.

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[17]Arndt, Kriegsverordnungen, Deutsche Juristen Zeitung (1914) 1152, 1154.

[18]Der Lusitaniafall, Juristische Wochenschrift (1915) 486.

[19]Dietz, Taschenbuch des Militärrechts (3rd ed.) 546 cited in Deutsche Juristen Zeitung (1915) 910.

[20]Das Prisenrecht des Deutschen Reichs, Deutsche Juristen Zeitung (1914) 1047.

[21]Neue Fragen des deutsch-englischen Seekriegs, Deutsche Juristen Zeitung (1915) 454.

[22]Die staatsrechtlichen Grundlagen der deutschen Prisenordnung, Deutsche Juristen Zeitung (1915) 910. He, therefore, does not regard the provisions concerning damages as necessarily creating substantive rights.

[23]18th May, 1915.

[24]1st June, 1915.

> It is incorrect to assume that the Code is exclusively a set of instructions to naval commanders; the contrary is the case as is shown not alone by the introductory words: "I approve the following Prize Code and decree * * *" but especially by a number of its provisions which can have application only to activities of prize courts and not to the actions of commanders, as, for example, the provisions regarding the award of damages (arts. 8, 12) and condemnation (arts. 17, 41, 42). Adopting the views of Heymann [D. J. Z. (1914) 1047] and Arndt [D. J. Z. (1914) 1154] the Prize Code must be regarded as an enactment having the force of law and based upon the imperial Law of May 3, 1884, relating to prize procedure [Reichsgesetzblatt (1884) 49].

The question as to the nature of the Prize Code appears, therefore, to be settled in favor of the view that it has, in part, the force of substantive law. This view has been confirmed by the Superior Court of Prize. Speaking of art. 37 (2), this court, in *The Semantha,*[25] says:

> This rule is externally clothed in the form of an instruction to the naval commanders just as the entire Prize Code is, in form, such a set of instructions. But it contains to a large extent rules of substantive law, as has been held repeatedly by this court. There is no basis for assuming that the article here involved is solely an instruction to the commanders. On the contrary, the reasons above given compel its recognition as a rule of substantive law.

Some articles are, however, clearly in the nature of instructions to the commanders, *e. g.*, arts. 114, 124-131. The Schedule annexed to the Code is an order signed only by the Chief of the Admiralty Staff, dated June 22, 1914, relating to the treatment of armed merchant vessels, and is sustainable, if at all, under the power delegated by the Emperor to make such changes in the provisions "as are not of a fundamental nature."

Thus, in *The Glitra*:[26]

> As Wehberg, (Österreich. Zeitschrift für öffentliches Recht, II 3, p. 282) correctly points out, Heilfron [Juristische Wochenschrift (1915) 486] goes too far when he wishes to give to the Prize Code

[25] 6th October, 1916.

[26] Superior Court of Prize, 17th September, 1915.

> the importance only of a command given by the Emperor to the commanding officers of the navy. The Prize Code contains, to a great extent, substantive law. But with regard to the precise question under dispute, Heilfron's characterization is correct. This article (114) is indeed only a command to the commanders of men-of-war. The Commander-in-Chief but not the legislator speaks. He does not desire to make substantive law and does not do so.

LAW ADMINISTERED BY THE PRIZE COURTS.

The law applied by the prize courts is national (municipal) law, and this national law must be applied, even if in conflict with the principles of international law. This doctrine was unqualifiedly laid down by the Hamburg Prize Court in *The Zaanstroom*:[27]

> Some of the claimants in the oral arguments expressed the view that the prize courts must apply the rules of international law, not those of national law. This view cannot be adopted. The prize courts are national tribunals. They are established by their own states to determine whether the organs of the state carrying on the maritime war have complied with the rules which they have been instructed to follow, and to pass on the legal consequences of their acts. From this it follows that the courts have to judge according to the law prescribed by their state, regardless of whether this law is in harmony with existing principles of international law or not. Whether this is so or not is not the province of the prize court to determine, but is left to the belligerent state, which alone is responsible in this regard to other states. The view sometimes advanced by the older authorities, that prize courts are bound to apply international law, even though the rule in question has not become a part of the national law, is to be absolutely rejected. [*Cf.* Heymann, D. J. Z. (1914) 1048; Wehberg, Seekriegsrecht 321.] Practically it would be impossible to carry out this idea. In many cases the so-called rule of international law is uncertain and unascertainable. Where this is not the case, the rule may have ceased to be applicable owing to the attitude of the respective belligerents, or to a change in the conditions forming the basis of its application. For example, it cannot be demanded that one belligerent shall continue to be bound and to require its prize courts to apply an international

[27] 1st June, 1915.

> convention which has been violated by the opposing belligerents, although such convention expressly provides that it is to remain in force in the event of war. Furthermore, it requires no detailed argument to demonstrate that certain rules of international customary law have been affected and have become inoperative by reason of new methods of naval warfare, as the submarine warfare. Finally, the argument that if a prize court applies national law, an international prize tribunal such as provided for in the Twelfth Hague Convention of October 18, 1907, might as a court of appeal apply a different law from that applied in the tribunal of first instance, falls to the ground, because such an international prize tribunal does not exist. It was the realization that the establishment of such a tribunal (described as "visionary" by Heymann, *loc. cit.*) would require a unification of substantive prize law as a condition precedent that led to the summoning of the London Conference on Naval Warfare in 1908, whose labors were rendered nugatory by the opposition of England. Before an international prize tribunal could have begun its labors it would have been necessary that the law contained in the Declaration of London should have become a part of the national law of each of the states parties thereto, at least as regards the other contracting states.

This is in accord with the views of recent German writers. So Wehberg:[28]

> As prize courts are national courts, they must apply the law prescribed by their state, even though in the case before them this law is in conflict with international law. The view formerly frequently announced in England and elsewhere, that prize courts are bound to administer international law, is based on a misconception. * * * If a state desires to fulfill its international obligations, it is bound to bring its national law into harmony with international law. It cannot be asserted that national prize jurisdiction is to be criticised because by its means arbitrary rules of naval warfare are set up and imposed on other states. Prize courts always remain the organs of an international person, *i. e.*, of their state, which remains responsible to other states for a proper application of international law. The rules applied by the prize court bind neither other states nor the home state. The government may at any time revise

[28] Seekriegsrecht (1915) 321.

> the national law by a recognition of the rules of international law.
>
> Prize courts may not assume the responsibility of a revision of national law, not even for the purpose of bringing the national law into harmony with international law. Where the national law conflicts with international law, the national prize courts are bound by the national law. If there exists no express provision in the national law the question must be determined by resort to the other principles of national law. Only when these also fail to determine the question, may the omissions in the national law be supplied by bringing in the rules of international law. * * * From this it follows that national prize jurisdiction is essentially not a matter of international law, but of national public law.

While Schramm[29] states that prize courts must decide according to the national and international law of prize, he continues by saying that the latter is applicable only in so far as it has become a part of the national law. So also Heilborn:[30]

> The court obtains jurisdiction under a law of the state. If it declines to obey the laws of the state it would be placing itself above the state, and be denying the very source of its authority.[30a]

The law administered by the prize courts is to be found primarily in the Prize Code, either in its express provisions, or by analogy.

The prize courts must also apply the provisions of treaties to

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[29]Prisenrecht (1913) 368.

[30]Grundbegriffe des Völkerrechts (1912) 91.

[30a]These views are of special interest in view of what was laid down by the English Privy Council in the case of The Zamora [1916] 2 A. C. 77, where Lord Parker says:

"It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court, as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive Orders of the King in Council." p. 93.

which the German Empire is a party, and the texts of which have been promulgated as law by publication in the Gazette. Thus, in *The Fenix,*[31] the Superior Court of Prize says:

> The Court of Appeal agrees with the claimants in presuming that the stipulations of Convention No. 6 of the Second Hague Conference must be taken into consideration in the case under review, although they have not been expressly included in the Prize Code. Why this was not done need not be discussed. At all events, the convention named is a state contract ratified by the German Empire, and published in the Gazette, and as such it must be taken into consideration by the prize courts.

But it is essential that the treaty was duly promulgated as law.

A prize court cannot take cognizance of an agreement between the German Government and the government of a neutral country whereby it was stipulated that a particular meaning should be attached to certain words in the list of contraband. It was accordingly held that sawn fir sleepers were subject to condemnation, although it was shown that by agreement between the German Empire and Sweden, the country of the claimant, only mining timber and fuel wood should be regarded as contraband. To be considered by the court such agreements must be published in the form of a law.[32] Equally binding upon the prize courts are the treaties entered into between Prussia and other countries, and to which the German Empire has succeeded. Chief among these was the Treaty of May 1, 1828, between the United States and Prussia, reviving certain provisions of the Treaties of 1785 and 1799 between the two countries.[33]

JURISDICTION OF PRIZE COURTS.

The Code of Prize Procedure, art. 2, defines prizes as follows:

> Prizes within the meaning of this Ordinance are enemy or neutral merchant vessels—that is, all vessels that are not state property—and enemy or neutral goods on board such vessels in so far as they are subject to seizure in the exercise of the right of prize.

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[31] 17th December, 1914.

[32] The Grenland, Superior Court of Prize, 6th October, 1916.

[33] The William P. Frye. See diplomatic correspondence between the United States and the German Empire, especially the letters of Von Jagow, Minister for Foreign Affairs to Ambassador Gerard, 4th April, 1915, and 7th June, 1915. The Indian Prince, Superior Court of Prize, 15th April, 1916. The Appam, 11th May, 1916.

Similarly, the Prize Code, arts. 1 and 2, provides:

> 1. During a war the commanders of H. M. ships of war have the right to stop and search enemy and neutral merchant vessels, and to seize—and, in exceptional cases, to destroy—the same, together with the enemy and neutral goods found thereon. * * *
> 2. The law of prize does not apply to public vessels of a neutral state. Public vessels of the enemy are confiscable under the laws of war, without further proceedings. (*Cf.*, however, art. 7.) Public vessels comprise ships of war as well as ships used in the public service of, and subject to the command of, the state. Other ships, the property of the state, are placed in the same category. * * *

The jurisdiction is more limited than that of an English prize court. It does not extend to German vessels, even if engaged in prohibited commerce or in assisting the enemy. Jurisdiction, furthermore, does not extend to German cargo on board German, neutral, or enemy vessels.[34]

The captor must have been exercising a right of prize not a purely military right. Thus, in *The Geertruida,*[35] a claim was presented by the neutral (Dutch) owners of a fishing vessel sunk by a German submarine. It appeared that the fishing vessel bore no flag or other indicia of neutral character, and the commander of the submarine from certain circumstances concluded that it was endeavoring to ram the submarine and to fire upon the latter from a deck gun. The fishing vessel was fired upon, and sunk. Upon a claim by the owners it was held that the prize courts were without jurisdiction, the jurisdiction being confined to cases where enemy or neutral vessels or cargoes are seized in the exercise of a right of capture. It is essential to the idea of a prize that it be seized. Here there was never a seizure or an intent to seize; there was the exercise of military force, to resist an attack, as provided for in Prize Code, art. 55 (a), not to overcome a resistance to capture within art. 15, nor a destruction within arts. 113, 115.

A seizure[36] (*Beschlagnahme*) or at least an intent to seize the vessel or cargo is essential in order to confer jurisdiction on a

[34]The Nyanga, Hamburg Prize Court, 25th September, 1915.

[35]Hamburg Prize Court, 8th December, 1916.

[36]The words "seizure" (*Beschlagnahme*), "capture" (*Aufbringung*) and "taking" (*Nehmung*) are identical in the meaning attached to them in international law and marine insurance. Diedrichsen & Co. *v.* Transatlantische Güterversicherungsgesellschaft, Imperial Supreme Court, Civil Cases, 25th October, 1916, 38 Hanseatische Gerichtzeitung (Hauptblatt) 28.

prize court. A seizure must be distinguished from the exercise of the right of visit and search, which affect the vessel and cargo only temporarily, while a seizure is always with a view to condemnation as prize.[37] It follows from this that a prize court is without jurisdiction to assess damages in cases where a war vessel in order effectively to exercise the right of visit and search orders a neutral vessel into a German port, where after inspection the vessel is released.[38]

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[37] *Ibid.*

[38] This is brought out clearly in the decision of the Superior Court of Prize in The Bertha Elizabeth, 3rd July, 1915:

The subject of prize jurisdiction is the determination of the legality of captures made during war. (Prize Code, art. 1.) Prizes are merchant vessels in so far as they are subject to seizure (art. 2). Seizure in this sense is synonymous with capture (art. 1, par. 2). The object of this action is the condemnation of the vessel in question in favor of the captor state (art. 17) and, therefore, in general, it should take place only when the search of the vessel shows such circumstances that the commander may reasonably expect a condemnation of the ship (art. 94). From this it follows that it is essentially a question of fact whether a ship brought into port is to be regarded as seized (captured) in the sense of the Prize Code, and in this connection the decisive factor is the intent of the commander.

In the case at bar, the ship was stopped on the afternoon of April 11, 1915, in the North Sea while engaged in fishing, and, as appears from the report of the commander of the war vessel, was brought for search to Cuxhaven. Nowhere is there any mention of a capture or seizure. In the ship's log there is only a note to the effect that the vessel was stopped and was brought to Cuxhaven for examination. After an examination had taken place, the ship was released on the morning of April 15 as non-suspect. From all of this, it appears that there was no capture with the intent of bringing about the condemnation of the ship. The capture of a vessel, it is true, consists essentially of certain acts culminating in the commander taking forcible possession of the vessel and compelling it to follow his orders. But just as the strict adherence to all of the formal instructions contained in the Prize Code is not an absolute condition to the validity of a capture, so also every temporary taking into possession of a ship by the commander of a war vessel and resulting in compelling the vessel to follow his orders cannot be regarded as a capture within the meaning of the Prize Code. As above stated, it is necessary to determine what object the commander had in view in the proceedings. Many cases are conceivable in which a commander subjects a vessel to his orders —as Schramm expresses it in his Prisenrecht, p. 306—brings it into a relation of subjection to himself, but where there is no capture. The necessities of war, more particularly, may require that all vessels within a certain marine area should at stated times be generally subjected to a minute search as regards their actions, but where, nevertheless there is no sufficient ground for a capture in the proper sense of the term. It is true that according to art. 91 of the Prize Code, the commander must proceed to a "provisional" capture when such measures result in substantial damage to the vessel that is subjected to search. But even the disregard of this regulation which may be regarded as being simply in the nature of an instruction would not give the prize courts jurisdiction, because such jurisdiction attaches only in the case of a complete capture and it is therefore not necessary in the case at bar to examine whether the conditions precedent of this regulation were complied with. In the view of the court in the present case, there is simply a question of a belligerent measure, the legality of which is not subject to revision by proceedings in a prize court.

LIMITS ON RIGHT OF CAPTURE.

The Prize Code, art. 3, provides that the right of capture may not be exercised within neutral territorial waters, nor within waters which by treaty are exempted from warlike operations or closed to ships of war. The right of capture, therefore, clearly extends to the high seas[39] and to the waters under the jurisdiction of any belligerent. There is no question that the right may be exercised within the territorial waters (maritime belt, *Küstengewässer*) of the belligerents.[40] Within the term "territorial waters" are included the bays and ports used for the purposes of ocean shipping, and this is not affected by the circumstance that the outlet from such port is through neutral territory. It has been held accordingly, that a capture may take place in the port of Antwerp, although the mouth of the Scheldt is neutral territory.[41]

Great diversity of opinion exists among the authorities as to the extent to which the right of capture is exercisable on rivers and closed seas within the territory of the belligerents. Rettich[42] takes the extreme view that the right is exercisable in all places where it can take place by means of war vessels, including all rivers and canals and even on land within radius of the ship's guns. Liszt, in the later editions of his work on International Law,[43] believes that the right of capture may be exercised in all waters capable of being navigated by ocean-going vessels, and this is also the view of Biensfeldt.[44] Boeckner[45] confines the right to

[39]Including straits connecting parts of the same (Sound) or enclosed high seas (Baltic). Schramm, Prisenrecht 61; Boeckner, Der Kriegsschauplatz 63, 64.

[40]Schramm, Prisenrecht 64. The estuary of the Trave between Lübeck and Travemünde cannot be regarded as one harbor basin. The course of the Trave between the two places (a distance of 20 kilometres) cannot be regarded as a harbor, within the meaning of the Sixth Hague Convention, art. 1 (2), and a vessel captured within this area is liable to condemnation. The fact that the regulation of the navigation of the river is subject to the jurisdiction of the two harbor authorities does not alter the situation. The Primula, Superior Court of Prize, 18th June, 1915.

[41]The Comte de Smet de Naeyer, Superior Court of Prize, 17th November, 1916. See also Kohler, Die Schiffe vor Antwerpen, Deutsche Juristen Zeitung (1914) 1225.

[42]Prisenrecht und Flusschiffahrt, Virchow and Wattenbach's Sammlung gemeinverständlicher wissenschaftlicher Vorträge No. 151, p. 735 *et seq.*

[43]Völkerrecht (10th ed.) § 41. *Cf.* the views expressed by the same author in the 2nd and in the 8th editions of his work.

[44]Das Prisenrecht in Flussläufen, 10 Zeitschrift für Völkerrecht 375.

[45]Der Kriegsschauplatz 90 *et seq.*

the maritime belt, while Perels[46] and Schramm[47] assert that the right is exercisable in all waters actually serving the purposes of ocean navigation. The question does not appear to have been decided by the courts.[48]

Article 3 of the Prize Code provides:

The right of capture and seizure cannot be exercised:

> a. Within neutral territorial waters, *i. e.*, within a marine area of a width of three sea miles, reckoned from low water mark, following the shore line and the islands and bays thereof. Islands situated not more than six sea miles from the coast of a mainland belonging to the same state, and bays whose coast line is in the exclusive possession of neutral states, and the arms of which are six sea miles or less apart are to be regarded as part of the shore line.

The interpretation of this article came before the Superior Court of Prize in *The Elida.*[49]

> The illegality of the seizure is first of all based on the fact that it took place within the zone of neutrality claimed by Sweden, *i. e.*, within four miles of the Swedish coast. Whether this was really the case is disputed, whilst it is certain that the seizure took place outside the three mile limit. In any event this is of no importance, since this objection was properly dismissed by the judge.
>
> It is true that a considerable number of states have extended by national law their territorial jurisdiction beyond the three mile limit, either generally or with regard to certain legal rights. This particularly applies to Sweden and Norway, which extended their national waters to a distance of four miles. A number of other states even went much further in this respect. But a special international title, valid in relation to the German Empire, and therefore to be taken into account by the prize court, does not exist, for up to the present time the Swedish claim has been recognized only by the Norwegian Government. According to official information from the German Foreign Office, Germany, especially in

[46]Das internationale öffentliche Seerecht der Gegenwart 159.

[47]Prisenrecht 64.

[48]See, however, The Comte de Smet de Naeyer, Superior Court of Prize, 17th November, 1916, holding that captures may be made in the port of Antwerp.

[49]18th May, 1915.

the course of the discussions concerning this matter which took place in 1874, did not accept Sweden's point of view, but treated the question of national waters as an open one, while England insisted upon the three mile limit. Similarly in 1897, when the Swedish Government addressed a communication to the German Legation at Stockholm concerning the fishery jurisdiction, the German Government restricted itself to raising no objection against Sweden's claim to a four mile boundary for the fishery and the question of the neutralization of this marine area in case of war was not thereby affected.

Therefore, under these circumstances, the decision must rest upon the basis of the German Prize Code, which in art. 3 (a) forbids the application of prize law within a zone of only three nautical miles from the low water mark of neutral coasts. * * * Thus far this conception also agrees with the legal opinion of Professor Dr. von Liszt, produced by the claimants.

Contrary to this opinion, however, the Superior Prize Court further is of the opinion that the instruction in question of the German Prize Code in no way violates the general principles of international law. Heretofore, the maritime boundary of states has been generally recognized in theory and practice as being three nautical miles distant from the coast. Originally, it was based on the carrying distance, corresponding to the gunnery technique of those times, of ships' and coast guns. It is true that at present this reason is no longer applicable. Here, however, the axiom *cessante ratione non cessat lex ipsa* applies, and although numerous proposals and opinions have been put forward with regard to a different delimitation of the national waters, it cannot be asserted that any other method has in practice met with the general concurrence of the maritime states. This is also true of the view put forward in the above mentioned opinion, according to which each individual state is entitled to extend, by means of independent regulations, the boundary of its national waters beyond the three mile zone as far as gun range, the former limit nevertheless to be regarded as a subsidiary international boundary. With the range of present day guns this would lead to quite intolerable conditions, and give to single states the possibility of including within their national territory extensive tracts of the open sea the freedom of which is to the interest of all maritime states. To a certain extent this is also

> acknowledged by Liszt in his opinion, for according thereto the regulation of the individual state is not alone sufficient; the absence of objection on the part of other states is also required. Thereby in reality the permissibility of an extension of the territorial waters is founded not so much upon the independent regulation by the single state, as upon the supposition of a tacit acknowledgment of such an extension by the other states. A mere failure to object, however, is not identical with a positive concurrence of the nations. Furthermore, it must be remembered that even if the exercise by a maritime nation of certain official functions, such as those of the health and customs authorities, is tolerated beyond the three mile zone, this by no means represents a concession to the effect that in all other respects the waters in question are included within the territorial jurisdiction.[50]

A capture is not invalidated by the circumstance that the captured vessel is navigated through the territorial waters of the neutral state to which it belongs. A Swedish vessel was captured on the high seas while on a voyage from Gothenburg to English ports. On the voyage to the German port under the direction of the German captor, the vessel passed through Swedish territorial waters. The Superior Court of Prize held[51] that this circumstance did not entitle the vessel to be released. There is no rule of international law to this effect, and art. 10 of the Thirteenth Hague Convention expressly provides that such acts are not to be deemed a violation of neutrality. The rule is otherwise, if the capture itself was effected within neutral territorial water. In the discussions at the Hague Conference of art. 23 of the same Convention, an amendment was offered to the effect that where a prize is brought into a port of the neutral state under whose flag the vessel sailed, the prize must be released. This view was not adopted. *A fortiori,* mere transit through the territorial waters, cannot operate to invalidate a capture.

In general, a capture is made by vessels of war. But it may also be made by land forces or by the port authorities. Thus, in *The Primula,*[52] the seizure took place by the port authorities of Lübeck upon orders of the Secretary of the Interior.

In *The Tello,*[53] a Swedish vessel was captured by a German

[50]Accord: The Crimdon, Kiel Prize Court, 6th January, 1915.
[51]The Thorsten, Superior Court of Prize, 14th April, 1916.
[52]Superior Court of Prize, 18th June, 1915.
[53]Superior Court of Prize, 26th June, 1916.

submarine for carrying contraband, and a prize crew placed on board. The submarine ordered the prize to follow, and proceeded towards a German port, when the Tello, a Norwegian vessel, came into view. The officer of the prize crew signalled from the Götaland, which was flying the German war flag, to the Tello to stop, and then proceeded in one of the Götaland's boats, with an engineer to the Tello, and caused this vessel to be sunk. In subsequent prize proceedings against the Götaland, it was held that she was not guilty of carrying contraband. On behalf of the claimant it was contended that the destruction of the Tello was unlawful, because (1) the orders had not emanated from the commander of the submarine, and (2) that they had been carried out from neutral territory, to wit, from the Swedish steamer which had been wrongfully seized. The Superior Court of Prize held as to the first point, that a capture may be effected by any person who at the particular moment holds the command. As to the second contention the court said:

> Nor can the lawfulness of the seizure be impugned on the ground that at the time of the capture the Götaland was a neutral vessel, though flying the German war flag. It is quite true that the right of capture cannot be exercised on neutral ground. It may also be correct that even against a vessel encountered on the high seas no measures connected with the right of capture may be taken from a war vessel which is within the territorial waters of a neutral state. This, however, is not the case here. The doctrine that ships are portions of the territory of the state to which they belong must not be taken literally. The meaning is not that the territory of the state is extended by the fact of the vessels sailing out to sea. By this rather figurative *dictum*, it is intended to convey in a general manner that in many respects the national laws are still applicable in the case of the vessel and her crew and her passengers after they have left the actual territory of the state. The prize crew which was put on board the Götaland did not by that act transfer itself on Swedish territory but remained still on the high seas. * * * If by the law of nations it was admissible that the Tello should have been held up and destroyed from a neutral merchant vessel, and with the use of her boat, the lawfulness of these measures remains unaffected, should the use made of the Götaland have been against the interests of that steamer and not justifiable to the

> Swedish State. But even from the point of view of the judgment rendered in the case of the Götaland, it cannot be admitted that the use made of the Götaland and her boat was illicit. According to the facts of the case the commander of the submarine which had seized the Götaland in pursuance of art. 16 (b) of the Prize Code was even justified in using the vessel as an auxiliary ship. At the moment of seizure, the officer is not able to ascertain with certainty all the circumstances which determine the guilt of the vessel that has been arrested. The procedure recognized by the law of nations permits the seizure of the vessel on adequate suspicion, since, as such, the seizure is a permissible measure, subject to examination in the prize court. In the face of this fact, the provision in the Prize Code, according to which the commander may use the vessel seized as an auxiliary ship, can only be construed to mean that such use does not depend upon the objection to the legality of the seizure, but merely on the fact that there have been adequate reasons for the seizure. (Prize Code art. 8.)

It has been seen above that prize jurisdiction does not extend to the public vessels of any state.[54] Such jurisdiction is limited to merchant vessels of an enemy or neutral state. A dredger is a merchant vessel within the meaning of the Prize Code, especially where it is equipped with lights, boats, crew rooms, compasses, *etc.* In general, a vessel is any craft floating upon the water, regardless of the purposes for which it is used, whether capable of self-propulsion or not. It may be used for the transportation of passengers or freight, or for other purposes, as cable-laying, salvage, ice-breaking. The expression "merchant vessel", as used in the Prize Code, covers all vessels, except public vessels, with this limitation, that the vessel must on account of its size or character be of some importance.[55] For the reason last given, small lighters and tugs are not seizable.[56]

The question as to the legal status of private yachts came up before the Superior Court of Prize in *The Primavera.*[57]

> Finally we must take up the defense that the Prize Code is not applicable because the Primavera as a steam yacht is not a merchant vessel within the mean-

[54]Prize Code, art. 2.

[55]De Brussels 31, Superior Court of Prize, 27th April, 1917.

[56]The Assistent, Superior Court of Prize, 27th June, 1916.

[57]6th October, 1916.

ing of the Prize Code. This defense was also properly rejected by the court below. It is clear from the provisions of the Prize Code, even in the light of the proceedings at the London Conference, from which issued the declaration regarding naval warfare upon which the Prize Code is based, that every vessel, not the property of the state, must be regarded as a merchant vessel within the meaning of the Prize Code. In the discussions regarding blockade, the American delegate, Wilson, declared that the expression "Navire de commerce" was susceptible of different interpretations; that in general it is regarded as meaning the same as "merchant ship" and that vessels might be classified under two heads, namely, les navires d'Etat and les navires privés, and that the latter expression embraced every kind of private vessel such as navire de commerce, yacht des particuliers, *etc.* He asked for an interpretation of the expression "by the Conference" and this was given as follows: "Après explication, il est entendu que le sens indiqué par M. Wilson sera considéré comme le sens exact du mot navire de commerce, qui, ainsi que l'indiqué M. Renault, comprend tous les navires autres que les navires d'Etat." (*Cf.* Niemeyer, Urkundenbuch zum Seekriegsrecht III, p. 1545.) In this sense, therefore, was the expression used in the Declaration of London, and the expression "merchant vessel" in the Prize Code must be understood in the same sense. This is expressly said in art. 2 of the Prize Procedure Ordinance, and as may be assumed without further question without regard to the authentic interpretation of the expression in the London Conference. The same appears also from the Prize Code itself. In art. 10 thereof, there is only a general reference to enemy vessels and in art. 6, certain classes of vessels are exempted from capture which unquestionably do not come within the meaning of merchant vessels in the narrow sense in which the claimant desires this expression to be interpreted. If under the expression "merchant vessels" only vessels engaged in maritime commerce were to be included, it would not have been necessary to exclude from capture hospital ships, coastwise fishing vessels, vessels engaged in religious work, *etc.*; because since these vessels are not engaged in maritime commerce, they would, under this view, not come within the category of merchant vessels.

As to objects on board the ship, it has been held that ship's accessories share the fate of the vessel.[58] Ship's stores are accessories in so far as they are necessary for the voyage upon which the ship is engaged;[59] where the amount is in excess of such needs such stores are regarded as cargo.[60]

Jurisdiction extends to enemy and neutral cargo on board enemy or neutral vessels.[61] The personal effects of the crew are neither a part of the vessel nor are they cargo within the meaning of the Prize Code,[62] and consequently the Prize Court is without jurisdiction to assess damages in case of alleged illegal destruction.[63] The word "goods" (*Güter*), as used in art. 115, means merchandise (*Handelsgüter-marchandises*).[64] The same applies to supplies, the personal property of the master.[65]

Whether bunker coal is to be regarded as cargo, as was done in The Indrani[66] and The Indian Prince,[67] or as ship's stores depends upon the circumstances of each case.

While art. 7 of the Prize Code, provides for the inviolability of letter mail, parcel post is part of the cargo, and is subject to seizure as such.[68] This subjects parcel post to the provisions of the Declaration of Paris, as regards countries that have ratified it.[69] This is also in accord with the declaration of the German delegate to the Second Hague Peace Conference, Dr. Kriege, that the Eleventh Hague Convention applies only to letter mail (*correspondance postale*).

In this connection it is interesting to note that two of the best known German authorities on international law, von Liszt[70] and

[58]The Neptune, Hamburg Prize Court, 11th December, 1915.

[59]The Pass of Balmaha, Hamburg Prize Court, 18th December, 1915.

[60]The Cocos, Hamburg Prize Court, 11th December, 1915, affirmed, Superior Court of Prize, 15th May, 1916.

[61]Not to German-owned cargo on any vessel. The Nyanga, Hamburg Prize Court, 25th September, 1915; The Lestris, Hamburg Prize Court, 18th May, 1917.

[62]The Cocos, *supra,* footnote 60. A sextant belonging to the mate released. The Fama, Hamburg Prize Court, 16th November, 1917.

[63]The Cocos, The Nogell, The Neptune, Hamburg Prize Court, 11th December, 1915.

[64]The Cocos, *supra,* footnote 60.

[65]The Björn, Hamburg Prize Court, 30th October, 1915.

[66]Hamburg Prize Court, 3rd July, 1915.

[67]Superior Court of Prize, 15th April, 1916.

[68]The Björn *supra,* footnote 65.

[69]Neukamp, Deutsche Juristen Zeitung (1916) 567, 574.

[70]Die Verbindlichkeit der völkerrechtlichen Verträge über das Kriegesrecht, Leipziger Zeitschrift (1915) 166-174.

Zitelmann[71] contend that in view of the fact that Russia, Montenegro, Serbia and Turkey are not parties to the Eleventh Hague Convention, the Convention is not binding on any one of the signatories, and that consequently even letter mail is not inviolable.[72]

Jurisdiction does not extend to enemy goods on board German vessels, nor to such goods after they have unloaded from any vessel. In other words, the German prize law does not adopt the doctrines announced in cases like *The Miramichi*[73] and *The Roumanian.*[74]

The latter question came before a civil court, and was finally determined by the Imperial Supreme Court in *Prenzlau's Fabrikwerke* v. *Transatlantische Güterversicherungsgesellschaft.*[75] Insurance had been effected to cover risks of seizure and condemnation while the goods were on board. The goods were shipped on board an English vessel, which upon the declaration of war put into an English port, where the cargo was unloaded and subsequently seized. It was held that the insured was not entitled to recover, as the risk was not insured against. The subsequent seizure and condemnation cannot be regarded as the result of the master's determination to put into an English port. Since the Crimean war a custom of days of grace for enemy vessels had grown up and this custom received recognition in the Sixth Hague Convention. Even if the binding force of this Convention in international law is doubtful, in view of the reservations made by Russia and Germany in respect of arts. 3 and 4, nevertheless the provisions show that at that time the former purpose of enriching the captor state had been superseded.

> This view-point of the protection of *bona fide* commerce is especially true as regards enemy goods entrusted to the vessels of the belligerent. The object of the prevention of enemy sea-borne commerce only justifies the detention and retention of such property, but not its condemnation * * *. If it is

[71]Die Anwendbarkeit der Haager und Genfer Abkommen im gegenwärtigen Kriege. 35 Archiv für öffentliches Recht 1, 23. *Cf.*, however, the same writer's Der Krieg und das Völkerrecht, in Deutchland und der Weltkrieg 661.

[72]For a contrary view, see Neukamp, in Deutsche Juristen Zeitung (1916) 567.

[73][1915] P. 71.

[74][1916] 1 A. C. 124.

[75]31st January, 1917, Hanseatische Gerichtszeitung (Hauptblatt) (1917) 61.

taken into consideration that during a war enemy property is not ordinarily transported on the vessels of the opposing belligerent, and if this occurs in rare cases it is punishable under the law relating to treason or trading with the enemy, it is clear why modern laws and international conventions regarding prize law do not consider the case of enemy goods on board vessels of the opposing belligerent, and the point is practically left out of consideration by the text writers. So, *e. g.*, art. 4 of the Sixth Hague Convention refers only to enemy goods on enemy vessels. So also, arts. 58-60 of the London Declaration of 1909 deal only with enemy or neutral goods on enemy vessels. Art. 2 of the German Code of Prize Procedure of April 15, 1911 [R. G. Bl. (1914) 302] defines prizes as follows: "Prizes within the meaning of this ordinance are enemy or neutral merchant vessels * * * and enemy or neutral goods on board such vessels, in so far as they are subject to seizure in the exercise of the right of prize." Similarly, the German Prize Code of September 30, 1909, art. 1 [R. G. Bl. (1914) 276]. Compare also art. 39 of the Oxford Regulations of the Institute for International Law. Westlake, International Law (1907) II, p. 129, describes the effect of the Paris Declaration as follows: "We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which as such is capturable at sea." Wehberg, who deals with the question of the condemnation of enemy property on vessels of the forum [Land-und Seekriegsrecht (1915) 175, 176] is of opinion that, from a legal standpoint, condemnation is permissible because the Declaration of Paris is not subject to extensive interpretation; but he adds: "In practice the states will here also take into consideration that their merchant vessels derive a benefit from the transportation of enemy goods, and will probably decide, in conformity with arts. 48 and 49 of the English Naval Prize Law and sec. 41 (2) of the Japanese Prize Law of 1904, that enemy goods are subject to condemnation only if the vessel is at the same time subject to capture under the provisions of the local law." Similarly Schramm, Das Prisenrecht (1913) 98. But as to enemy goods on board vessels of the forum, Wehberg properly holds (*loc. cit.* 199, note 1) art. 4 of the Sixth Hague Convention to apply, because goods on board enemy vessels cannot be treated more favorably than those on own vessels of

> the captor. For a contrary view: Huberich, Englisches Prisenrecht (1915) 56. It is true that during the present war, the English prize courts in the present case and in several other cases have ordered the seizure and condemnation of enemy property. In so doing, they have given to the often-announced rule of English prize law, that the right of seizure extends to enemy property at sea or afloat in port. * * * [*The Miramichi,* Prize Cases (1916) 147 544; Huberich, *loc. cit.* 52] an extensive interpretation, so as to cover seizure and condemnation on land, where the property has not been delivered to the owners. (citing and discussing *The Roumanian, The Achaia*) * * * Whether these decisions are correct from a juristic standpoint, it is not our purpose to discuss. At all events they do not conform to the progressive views on international law prevailing prior to the present great war, nor meet the expectations extensively cherished before the war as to the administration of international law in the event of war.

That goods should be seized and condemned after being unloaded was an unexpected circumstance with which the insured at the time when the contract was made did not reckon, and which was not to be reckoned with when the master determined to take the vessel to England. Hence, this determination of the master cannot be regarded as the equivalent of the seizure and condemnation insured against.

It is immaterial where the cargo is carried, whether in the hold or on deck, or suspended from the side of the vessel, or taken in tow either alongside or behind the vessel. It was accordingly held that empty lighters that are being conveyed to their destination by a tug are cargo.[76]

National Character.

The national character of a vessel is determined primarily by the flag which she is entitled to fly.[77] Neutral vessels engaged in trade closed in time of peace, or resisting search or capture are also regarded as having an enemy character.[78]

By an Ordinance of July 16, 1917,[79] neutral vessels, totally or

[76]The Zuiderzee and The Gouwzee, Superior Court of Prize, 27th April, 1917.

[77]Prize Code, art. 11.

[78]Prize Code, art. 16.

[79]Reichsgesetzblatt (1917) 631, 652.

in greater part owned by subjects of an enemy state, or chartered by an enemy government, or sailing in the interest of belligerent operations of the enemy are also to be treated as enemy vessels. This Ordinance adds a new article (11 a) to the Prize Code, as follows:

> A neutral vessel is to be regarded as an enemy vessel if it is owned wholly or for the greater part by enemy subjects.
>
> Within the meaning of this provision, juristic persons or other associations having their place of business within an enemy country are to be regarded as subjects of an enemy state. If the capital is predominantly owned by enemy subjects, or if the business is conducted and supervised by enemy subjects and in an enemy country, the legal position is the same as if the place of business were in an enemy country.
>
> Unless the facts show to the contrary, enemy direction or supervision of the business will be assumed if enemy subjects participate therein or if the business is partly directed from an enemy country. The same is true if it be shown that a participation in the capital or profits of the business by enemy subjects exists, or if the means for carrying on the business are obtained from an enemy country.

The question of a transfer of flag after the outbreak of war arose in *The Pass of Balmaha.*[80] The vessel was sailing under the American flag to which she had been transferred by her former British owners in February, 1915.

> Regarding the vessel the question arose as to whether it is to be regarded as an enemy vessel inasmuch as it was transferred after the outbreak of the war, in January, 1915, from the English to the American flag. The provisions of law involved are art. 2 of the Prize Code and art. 56 of the Declaration of London of February 26, 1909.
>
> The Prize Code even more clearly than the Declaration of London declares that the transfer of a ship from an enemy to a neutral flag after the outbreak of hostilities will invest the vessel with a neutral character only if the transfer had no relation to the war; when the transfer results from causes having no connection with the war. In this connection the Prize Code interprets art. 12a of the Prize Code as meaning that it rests not exclusively on the

[80]Hamburg Prize Court, 18th December, 1915.

> conviction of the commander (that the transfer would have taken place even if war had not broken out) but that the prize court must itself determine whether the commander of the war vessel after proper consideration should have come to the conclusion that the transfer of flag would have taken place even if war had not broken out.

Where the transfer took place after the outbreak of the war, it is not sufficient to show that there was a genuine and unconditional sale to the neutral. The parties must also have acted in good faith. The claimants must show that in purchasing the vessel, the consideration that the vessel was thereby placed under the protection of the neutral flag was not one of the motives of the transaction.[81]

Art. 20 (c) of the Prize Code requires that the title should be in the neutral before the vessel sails. Where the property is transferred by delivery of the bills of lading, such bills of lading must be in claimant's possession when the vessel sails. It is not sufficient that the delivery took place some time before the vessel was captured. Nor is an unsigned bill of lading a proper document to evidence transfer.[82]

Where goods were bought but warehoused by the seller, with the reservation of the right to sell the specific goods and to replace them by similar goods, there is not a sufficient transfer of ownership. But acquisition of ownership by a purchasing agency of the claimants in their behalf is sufficient.[83]

According to art. 20, in the absence of clear proof of the neutral character of goods found on board an enemy vessel, the presumption is that the same are enemy property. It must be shown that the goods were neutral property when they left port, and that they have not become enemy goods in transit. All bills of lading must be produced.[84]

Passing of Property.

The property in the captured vessel or seized cargo passes as the result of the decree of condemnation, not at the moment of

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[81]The Cubano, Superior Court of Prize, 27th October, 1916; The Trondjhemsfjord, Superior Court of Prize, 15th December, 1916.

[82]The Lestris, Superior Court of Prize, 8th January, 1918.

[83]*Ibid.*

[84]The Lestris, Hamburg Prize Court, 18th May, 1917; The Dania, Kiel Prize Court, 5th December, 1915.

capture.[85] The captor state acquires an original title by virtue of *occupatio jure belli*—not a derivative one.[86]

The captor, therefore, takes free of any liens. Thus, in *The Fenix*:[87]

> The firm of Gehrckens bases its claim furthermore on the fact that because of outlays made on behalf of the ship's captain, it had acquired a bottomry right on the ship, the proving of which was reserved in case of condemnation. Here, too, may be left out of consideration the question whether the firm on account of its outlays, or a part thereof, actually acquired a real right in the S.S. Fenix, since the bottomry right would at once become void upon the condemnation of the ship. Condemnation, according to prize law, is an original method of acquiring possession, an *occupatio jure belli,* which, according to generally acknowledged principles of international law, gives to the occupant the ownership of the object seized free of every encumbrance. The decision in the case of *The Maria Glaeser,* rendered by the English Prize Court at its third session, after mature consideration of the practice of other prize courts, shows that the English Prize Court also takes this point of view. (The Times, 17th September, 1914). In that case it was a matter of a mortgage acquired by a neutral before the capture of the ship, and the consideration of the claim of the neutral mortgagee was denied on the ground that according to the principles of prize law, the rights of third parties in a captured ship cannot be recognized. It is also hinted in the decision that the case would not have been adjudged differently if the mortgagor had been a British subject.
>
> In the present case the bottomry right is said to have arisen after the capture of the ship. According to the opinion of the Court of Appeals, however, this

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[85]A vessel insured under a time policy was captured by the English and a prize crew put on board. In the course of the voyage to an English port, fires broke out in the bunkers, and the vessel was destroyed. It did not appear that the fire was attributable to the negligence of the prize crew. It was held that the insurance was payable. The owners had an insurable interest at the time of loss, as under English law, which applies in the case at bar, the owners' rights are not terminated until adjudication in a prize court, and no evidence of such adjudication was introduced. The Catharina, Oberlandesgericht, Hamburg, 5th July, 1916, Deutsche Juristen Zeitung (1917) 249; Imperial Supreme Court, 13th January, 1917, Deutsche Juristen Zeitung, (1917) 432.

[86]Schaps, Rechtsprechung der deutschen Prisengerichte, Juristische Wochenschrift (1915) 1164.

[87]Superior Court of Prize, 17th December, 1914.

makes no difference in adjudging such bottomry right, since under prize law it is void as against the legal effect of seizure. The same is true of an alleged bottomry creditor in his capacity as citizen of the Empire. It is not evident why an exception should be made to the above mentioned principles in favor of citizens of the Empire.

Illegal Capture.

Art. 8 of the Prize Code provides that damages are recoverable for an illegal capture or seizure, unless there were sufficient grounds to justify the action of the captor. The law presumes such grounds to be sufficient in case of spoliation of ship's papers or similar irregularities. In *The Hasenkamp,*[88] the vessel was released, but damages were refused on the ground that the names of four persons on the crew list did not correspond with the names of persons on board. In *The Dahlia*[89] the absence of entries in the log-book regarding previous voyages was regarded as a suspicious circumstance, and as justifying capture. But the mere fact that the vessel emitted dense smoke does not justify capture for unneutral service.[90]

In *The Pass of Balmaha*[91] a claim by the neutral owners of the cargo for damages was rejected because, first, the vessel was held to be an enemy vessel, and second, the goods were consigned to the order of the consignors, and documents were found on board indicating a sale to Russian cotton mills, but not indicating that the sale was on credit.

Where the cargo of a neutral vessel contains conditional contraband amounting to more than one-half of the total cargo in weight, and the shipments were to order, and there was some discrepancy in the designation of consignees in the manifest and in the bills of lading, the captor had reasonable grounds for sending in the vessel for adjudication, and the owners are not entitled to damages.[92] So also the commander may take a vessel to port for examination, where an examination at sea presents special difficulties.[93]

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[88]Hamburg Prize Court, 18th February, 1915, affirmed on appeal.
[89]Superior Court of Prize, 29th June, 1916.
[90]The Lisbeth Betty, Superior Court of Prize, 29th June, 1916.
[91]*Supra,* footnote 80.
[92]The Norden, Hamburg Prize Court, 8th December, 1916.
[93]The Star, Superior Court of Prize, 25th November, 1915.

The conduct of the commander is judged by an objective standard.

> According to the view of the Prize Court there were sufficient grounds for the seizure in all of the cases before the Court. In the determination of this matter regard cannot be had to the facts as they appeared after the circumstances were more fully examined and the testimony of experts admitted. The determining factor is whether at the time of the seizure, looking at the facts from the viewpoint of the commander ordering the same, there were, objectively considered, sufficient grounds for the capture of the vessel and the seizure of the cargo. The cases mentioned in art. 8 (1) and art. 13 (c) and 14 (c) of the Prize Code are merely examples * * * It may be that there were not sufficient grounds for the seizure even though the commander subjectively was of the opinion that such grounds existed. In all cases the standard to be applied is whether a careful commander, judged by an objective standard, would after investigation have been justified in regarding the grounds of the seizure as sufficient.[94]

The question of the measure of damages in case of illegal capture arose in *The Sydney Albert*:[95]

> The Prize Code has not determined the manner of estimating damages in case of illegal capture. The article of the Prize Code in question is an almost literal reproduction of art. 64 of the Declaration of London of February 26, 1909, regarding naval warfare. According to the Explanatory Memorandum annexed to the Declaration (par. 4) the question whether a distinction was to be made between remote and proximate damages to the vessel and cargo was discussed in the Conference. It was, however, deemed expedient to give to the prize courts free scope in the assessment of damages which would vary according to circumstances, and the amount of which should not be too minutely determined in advance by hard and fast rules.
>
> According to international practice, as followed in numerous cases since the decision of the Geneva Tribunal in the Alabama Claims (20 Martens, Nouveau Recueil, 728, 774) in claims for damages

[94]The Belle Ile, Kiel Prize Court, 6th January, 1915, reversed on other grounds, Superior Court of Prize, 6th July, 1915.

[95]Superior Court of Prize, 25th November, 1915.

sustained by the nationals of a state and for which another state is made answerable, claims for injuries only remotely arising out of the illegal acts or the loss of future profits, of a more or less hypothetical nature, are not considered. The same rule must be adopted in estimating damages under the law of prize.[96] In the proceedings at the London Conference, this point was emphasized by the German delegation, without contradiction, although it was added that prize courts should not apply this principle with too great severity.

In the case at bar, the claim for damages made by claimants, and which was approved with certain modifications by the trial court, included the prospective profits the vessels would have earned in fishing voyages during the time she was detained in Hamburg. The making of these voyages, and the resulting profits were, however, dependent upon so many contingencies that they cannot serve as a basis for estimating damages. The Superior Court of Prize declines to revise the several items of the claim. In view of the fact that unquestionably certain damages are proximately caused by the enforced idleness of the vessel, the court rejecting the appeal of the claimants, has fixed, in the exercise of its discretion, on an amount set forth in the decision, which amount includes the cash expenditures of the claimant. Interest is due only from the date of the enforcement of the liability for damages. The costs below and on appeal are imposed on the Empire, because the assessment of the amount of damages was in the discretion of the court.

In estimating damages for the illegal capture of a vessel, the terms of the charter, and the size and age of the vessel may be considered.[97] In all cases it is the value at the time of capture.[98]

In *The Thorsten,* the Kiel Prize Court[99] rejected a claim for damages set up by a passenger for loss occasioned by the delay. Whether a claim of this character can be entertained by a prize court was not decided as the court held that in the particular case the capture of the vessel was justified.

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[96]The amount recoverable is thereby kept within narrow limits. Buresch, Prisenrecht und Prisengerichtsbarkeit, Deutsche Juristen Zeitung (1916) 471, 474.

[97]The Elida, Kiel Prize Court, 23rd February, 1916.

[98]The Kiew, Superior Court of Prize, 28th June, 1916.

[99]Cited by Schaps, Rechtsprechung der deutschen Prisengerichte, Juristische Wochenschrift (1915) 1164.

CONTRABAND.

The lists of contraband contained in the Prize Code at the time of its promulgation were identical with those set forth in the Declaration of London, arts. 21 and 24. Since that date the lists have been amended from time to time,[100] the last revised lists being set forth in the Ordinance of June 25, 1917, as amended by the Ordinance of January 18, 1918.[101]

In view of the detailed manner in which the objects declared contraband are set forth, the contraband lists must be given a strict interpretation.[102] Where there has been a change in the list of contraband, the vessel is not liable unless affected with notice of such change. In determining this question, the circumstances set forth in art. 45 of the Prize Code may be taken into consideration, but do not announce presumptions.[103]

In determining whether particular articles are to be regarded as contraband, the court may take into consideration the existing economic conditions as indicating a probability that the goods are ultimately destined for the use of the enemy government.[104]

Where it is charged that the contraband carried is in excess of one-half the value of the entire cargo, it is the value of the goods at destination, not their value in Germany, that determines the question.[105]

The fact that goods were consigned in small lots to retail dealers is important but not conclusive.

> It is clear that the strictest requirements of proof must be made in order to overcome the presumption because nothing is more simple than the use of a non-military but false name of consignee. It is well known that army contractors frequently purchase the goods required by them from retail dealers; it is furthermore not impossible that the retail dealers, upon receipt of the goods claimed, would have sold the

[100]Prize Code, arts. 22 and 24 provide that the lists of contraband may be extended. It is immaterial how these additions are made—whether by statute, ordinance, or otherwise. The Elsa (Barque), Superior Court of Prize, 13th August, 1915.

[101]The lists of contraband as set forth in the Ordinance of 25th June, 1917, [Reichsgesetzblatt (1917) 554], as amended 18th January, 1918, [Reichsgesetzblatt (1918) 43], are set forth with some annotations in an appendix to this article.

[102]The Storesand, Superior Court of Prize, 26th April, 1917; The Jeanne, Hamburg Prize Court, 6th July, 1917.

[103]The Elsa (Barque), Superior Court of Prize, 13th August, 1915.

[104]The Laila, Hamburg Prize Court, 4th November, 1915.

[105]The Berkelstroom, Hamburg Prize Court, 6th January, 1917.

> same to the canteens of the military depots, *etc.* It may furthermore be assumed that in view of the general scarcity of food prevailing in France as in other countries, the state would have seized the foodstuffs upon their arrival in Bordeaux and would then have used the same for the army either to the exclusion of or jointly with the civilian population, just as in Germany this is done through the Central Purchasing Agency.[106]

The quantity of particular goods may be an important factor in determining whether the same are destined for the use of the military forces of the enemy.[107]

In general, the claimant must produce evidence showing that in the ordinary course of events the goods will not be used for enemy purposes.[108]

Enemy Destination.

The Prize Code in the form in which it was originally promulgated followed the Declaration of London as to the rules governing enemy destination of contraband. It authorized the commanders to regard the ship's papers as determining the destination of the vessel, unless there was deviation. If, however, the papers did not fix the destination, or permitted the vessel to enter an enemy port or to unload the cargo at such port, the commander was authorized to presume an enemy destination.

By the Ordinance of April 18, 1915,[109] art. 33 was amended so as to provide that enemy destination of conditional contraband is to be presumed:

> (a) When the goods are consigned to an enemy authority or the agent of such, or to a dealer shown to have supplied articles of the kind in question or products thereof to the armed forces or the administrative authorities of the enemy state.
>
> (b) When the goods are consigned to order, or the ship's papers do not show who is the consignee, or the goods are consigned to a person in territory belonging to or occupied by the enemy.

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[106]The Niobe, Hamburg Prize Court, 9th March, 1917.

[107]Where only small quantities of coffee (30 sacks) were on board, it is not improbable that no further export was intended from Sweden. The Corfiz Beck Friis, Kiel Prize Court, 23rd February, 1916. But 200 sacks of onions were regarded as such a quantity as to raise a contrary presumption. The Luise, Kiel Prize Court, 24th February, 1915.

[108]The Iyden, Kiel Prize Court, 15th December, 1915.

[109]Reichsgesetzblatt (1915) 227.

(c) When the goods are destined for a fortified place of the enemy, or to a place serving as a base of operations or supplies of the enemy forces.

Paragraph (b) indicates the beginnings of the adoption of the doctrine of continuous voyages in the case of conditional contraband.

A further extension of the doctrine is seen in the Ordinance of July 22, 1916.[110] Amending art. 30, this Ordinance provides that proof of the destination of absolute contraband shall be deemed complete, in addition to the cases set forth in the article as originally adopted, in all cases where, regardless of the port of destination, the goods are consigned to order, or the ship's papers do not show who is the consignee, or the goods are consigned, directly or indirectly, to a person in territory belonging to or occupied by the enemy, or to a person who during the present war has directly or indirectly supplied contraband to the territory belonging to or occupied by the enemy or to the administrative authorities of the enemy state or the agents of such authorities.[111]

Art. 33, relating to conditional contraband, as amended by the Ordinance of April 18, 1915, has also been changed so as to conform to the provisions relating to absolute contraband.

Through these amendments the doctrine of continuous voyage has received a more extended application. Under the old rule, contraband consigned to a neutral port to order or to a munitions firm was not subject to condemnation unless the evidence showed that it had in fact an enemy destination. The burden of proof is now on the claimant to show innocent destination.[112]

In all cases, the point is not the destination of the vessel, but the destination of the particular cargo. Therefore, it is the person who in fact is to receive the goods at the end of their transportation who must be shown to be unquestionable.[113]

Art. 40 was amended by the Ordinance of April 18, 1915,[114] so as to provide that a vessel shall be liable to condemnation for

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[110]Reichsgesetzblatt (1916) 773.

[111]In The Corfiz Beck Friis, *supra,* footnote 107, it was said that the fact that the claimant is engaged in the sale of war materials to the enemy is not, of itself, sufficient to raise the presumption that all of his business dealings are with the enemy.

[112]Lindemann, Feindliche Bestimmung der Kriegskonterbande 90 *et seq.*

[113]The Vega, Superior Court of Prize, 17th February, 1916; The Loke, Kiel Prize Court, 6th October, 1915; The Artemis, Kiel Prize Court, 6th October and 24th November, 1915.

[114]Reichsgesetzblatt (1915) 227.

the carriage of contraband on former voyages, if she carried such contraband contrary to the indication of her papers.

In the consideration of the decisions under these sections the changes in the law indicated above must be kept in view.

The leading case on the question of enemy destination is the Maria,[115] decided under the law as originally enacted.

> The assumption of the commander of the Karlsruhe that the entire cargo of the Maria was destined for Belfast did not agree, it is true, with the facts, the larger part being destined for Dublin. The judge of the lower court did not enter into the question whether Dublin too, was a place of the kind named in Art. 33 c, d, of the Prize Code at the time when the Maria was expected there; he declared it sufficient that the ship was to have first called at Belfast, to which place at all events those provisions of the Prize Code referred, and that therefore the portions of the cargo destined for Dublin were also first directed thither. Whether this holding should be concurred in need not be considered, since in the meantime an official declaration has been received from the Chief of the Admiralty Staff, according to which, since the beginning of the war, Dublin also has served as a base of operations and supply for the English forces. Thus the legal presumption of the enemy destination of the goods is supported.
>
> It has been repeatedly decided, and therefore needs no further argument, that the presumptions set up in the Prize Code shall be given effect in judicial decisions. It therefore need only be considered whether the claimant has succeeded in rebutting this presumption. The lower court decided that the proofs submitted were insufficient, since even if the original intention had been to sell the wheat to mills operating for private persons, it could not be positively established to what use the wheat would actually have been put upon arrival in Belfast and that the English Government would not gladly have purchased it and at a high price, especially since the bill of lading was made out simply to order. This the claimant opposes, stating that the point is, not what would possibly have become of the cargo, but whether its destination was an enemy one; if this be not acknowledged, the proof, which is allowed in rebuttal of the presumption, would become an impossibility.

[115]Hamburg Prize Court, 17th April, 1915, affirmed by Superior Court of Prize, 5th October, 1915.

This contention is not correct. It is true that if only the wording of Arts. 32 and 33 of the Prize Code be considered, it might appear as if all questions had to be considered as of the time of seizure. Conditional contraband is, according to those sections, liable to seizure upon proof that it is destined for the enemy forces and such a destination is to be presumed when the facts stated in Art. 33 are given. It must not be taken from this, however, that the presumption applies only to the time of the seizure, and that the proof in rebuttal is to be considered as sufficient when it is shown that at the time of seizure the goods did not have an enemy destination. It was proper and necessary thus to express the rule in the Prize Code because it is in the form of instructions to the commanders of men-of-war, who are only called upon to take into account the facts existing at the time of seizure. Pending the decision of the prize court, however, a certain time must naturally elapse, and in consequence, the instructions can have only a corresponding application, as is immediately apparent when the Declaration of London is taken into consideration. It is impossible to admit that the court is bound to leave subsequent happenings out of consideration, as for instance, a sale of the cargo to the enemy forces after capture and in ignorance of the same, or to consider the consignment of the cargo to a notorious army contractor as innocent because it was proved that at the time of seizure he had not yet resold the same to the government.

Art. 33 of the Prize Code gives as the ground for the presumption of the place of destination, the address to which the shipment was originally consigned; the content of the presumption, however, has nothing to do with the address, but refers to the real destination, the destination for the use of the enemy forces. If the place of destination exists, this is taken as proof of the real destination. Proof in rebuttal, it is true, may be offered, but it is not sufficient to prove that at the time of seizure the aforesaid disposal of the goods had not yet been made; for just as in cases in which the legal presumption does not come into operation and the proof of the hostile destination is not confirmed to facts which had already occurred at the time of seizure, so the content of the presumption can likewise not be subject to such a restriction. Otherwise, it would be most easy to avoid the seizure of conditional contraband by abstaining from giving the goods in the

> first instance any but a purely local destination. Whether or not proof in rebuttal may be submitted can only depend on consideration of the facts of each individual case. It also depends on the kind of cargo, and how important under existing circumstances it might be for the armed forces of the state and, consequently, upon the probability that the enemy government would acquire it. In the prize cases of *The Alfred Hage, The Havsoe, etc.*, the court declared the presumption rebutted because proof was submitted which established that the cargoes, consisting of pitwood, were actually sold on the spot where they were required and would there be used and consumed, and the court could not but hold that the cargoes would have been actually used by private persons as intended. The present case is essentially different. The only actual fact is that at some time before the outbreak of the war the wheat was sold and shipped to an English importer. As to the rest, there were brought forward only assurances of the purchasers that they were not army contractors or anything of the sort, and that it was their intention to sell the wheat to mills in the nieghborhood of their branches in order to meet their normal requirements. This may be taken as the literal truth, but it would still be absolutely uncertain where the wheat would in reality have gone, quite apart from the fact that after all the point is not where the corn is ground but for whom and for what the flour is intended.

In *The Modig*[116] the Superior Court of Prize regarded the facts such as to show that the cargo (conditional contraband-coal) consigned to the municipal gas works at Helsingfors were intended for the sole use of the civilian population. The port of destination in Raumo, was a naval base of the Russian torpedo fleet, according to the official statement of the Chief of the Admiralty Staff, and therefore the presumption of warlike use arose. The court held further that to overcome this presumption it was not sufficient to prove that at the time of the capture the goods had not been sold to the enemy forces or administrative authorities, but that it must be shown that in the ordinary course of events such uses were not probable. This, it was held, would generally be the case where the private consignee is also the consumer. Where coal is used by a gas work, its further warlike use was excluded. The mere fact that the cargo might be subject to seizure by the government for

[116] 5th October, 1915.

use for war purposes was too remote a contingency; the adoption of this view would render all articles designated as conditional contraband liable to condemnation.

The statements of the claimants that their intention was to devote the cargo only to civilian purposes are not in themselves sufficient to overcome the presumption.[117] Nor are certificates of consular officers of neutral countries to the effect that the consignee does not stand in business relations with the enemy state sufficient evidence.[118]

In *The Laila*[119] the Hamburg Prize Court cast doubts on the value as evidence of affidavits, but the Superior Court of Prize in *The Elna*[120] has recognized affidavits as evidence.

The Norwegian vessel Semantha sailed with a cargo of wheat, from Portland, Oregon, to Queenstown, Falmouth, or Plymouth for orders, and was captured and sunk by a German cruiser. It was held that while under Prize Code, art. 33 (d), before its amendment, the presumption of hostile destination did not arise yet art. 37 (2) provides that if the ship's papers contain no specific destination for the goods, the captor may assume their destination to be any port which the vessel must or may touch. It being shown that the English ports named were military bases, the cargo was condemned.[121]

On the other hand, where a vessel is still to go to other neutral ports for taking on cargo, and the bill of lading read "via other loading ports," there is no presumption of the vessel going to enemy ports, such as arises where the bills of lading read "via other ports."[122]

A conditional destination is sufficient. In *The Helikon*[123] the circumstances were held to show that the vessel which left England with coal before the war for a Chilean port, and had put into Port Adelaide for repairs, left the latter port on the 10th September, with orders to deliver the coal to English war vessels in case she should meet such on her voyage to Chile. This conclusion

[117]The Maria, Superior Court of Prize, 5th October, 1914; The Sigurd Hund, Hamburg Prize Court, 4th November, 1915.

[118]The Luise, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915.

[119]4th November, 1915.

[120]4th April, 1916.

[121]The Semantha, Superior Court of Prize, 6th October, 1916.

[122]The Norefos, Superior Court of Prize, 6th July, 1915.

[123]Hamburg Prize Court, 4th November, 1914, Reversed on its facts, Superior Court of Prize, 17th November, 1916.

was arrived at by the fact that the owner of the cargo was known to be one of the most active supply agents of the English navy, and that the route chosen by the vessel was an unusual one. It is immaterial whether the consignor or the consignee determined the ultimate destination.

In *The Kiew*,[124] claimants pleaded that the goods were diverted to England against their will by the shipowner who did so in fulfillment of an obligation incurred towards the British authorities. In denying the claim the court said:

> The ultimate aim of all regulations as to contraband is to prevent the prohibited articles from reaching enemy territory and the fighting forces of the enemy * * * The goods must have been brought consciously and deliberately on the way to enemy territory, and this is the case even if the shipowner acting arbitrarily in the matter should order them to be thus sent * * * The assumption of the law that the consignment was addressed to an enemy authority does not hold good any the less, because that authority is the British Prize Court. The special legal position of this Court can only be considered in so far as it is constituted without any doubt an authority. It may be granted that it has nothing whatever to do with the equipment and supplies for the British forces. This, however, does not affect the matter. Since the goods were to be placed at the disposal of the British Prize Court there is according to art. 33 a of the Prize Code every justification for assuming that the goods were destined for use by the armed forces or the administrative service of the enemy state, and it is incumbent on the claimants to refute this presumption.

It was further held that the case did not come within art. 98, relating to recapture. Recapture implies an original taking by military force. A mere constraint, as for example, alteration of course or entry into an enemy port for examination, is not enough. The intent or knowledge of the neutral consignor does not affect the case. Even where the consignee is the agent of the consignor, it may be that the consignee, without the knowledge of the consignor, has destined the goods to a warlike use. The ownership is not decisive, but the destination intended by the person having the control of the cargo is.[125] The fact that the goods were sent

[124]Superior Court of Prize, 9th February, 1917.

[125]The Kiew, Kiel Prize Court, 21st June, 1916.

on consignment is immaterial.[126] But a merely supposed enemy destination does not justify condemnation.[127]

The information officially given by the Chief of the Admiralty Staff as to what places are fortified or serve as naval bases or as bases of supplies, while not binding on the prize courts, is regarded as convincing testimony upon these points.[128] The courts will take judicial notice of the fact that London, as the center of the political and commercial activity of England, is a military base.[129]

The presumption of enemy destination arises in all cases where the shipment is "to order."[130] This point frequently comes up in connection with shipments consigned to one or the other of the import trusts, such as the Netherlands Overseas Trust. In *The Lupus,*[131] it was held that the consignee was held to strict proof to overcome the presumption of enemy destination, especially in view of the strong British influences in the management of the Netherlands Overseas Trust.

But the presumption may be overcome by the fact that there is a prohibition of export of the particular commodity from the country to which it is consigned,[132] or by the fact that the goods in question were exported under license from the enemy country.[133]

[126]The Medea, Hamburg Prize Court, 13th August, 1915.

[127]The Zaanstroom, Hamburg Prize Court, 1st June, 1915.

[128]The Zaanstroom, *supra,* footnote 127; The Maria, Hamburg Prize Court, 17th April, 1915.

[129]The Zaanstroom, *supra,* footnote 127.

[130]A shipment to a named person "or his or their assignees" is a shipment "to order." The Embla, Kiel Prize Court, 15th December, 1915.

[131]Hamburg Prize Court, 27th April, 1917.

[132]The Harald Haarfager, Kiel Prize Court, 4th July, 1917.

[133]The Lestris, *supra,* footnote 82. The court said:

According to Prize Code arts. 23, 33 (a) and 35 (a) enemy destination must be suspected even if the ship is on her way to a neutral port, if consigned to order or to a consignee whose name cannot be found in the ship's papers. In this case the *premier jus* was consigned to the Netherlands Overseas Trust for the account of the Margarine Works, formerly Cohen & Van der Laan, Haarlen, or order. Both the above requirements have been fulfilled, therefore, as by the consigning of the goods to the Trust the real consignee could not be seen from the ship's papers. Meanwhile, the legal suspicion of enemy destination has been overthrown by the circumstances of the case. As appears from the export licenses produced with the documents, the English Government granted the export of the parcel of *premier jus* to Holland. Although the Trust is entitled, as is known to the Prize Court, by the contract signed by the importer for every import into Holland to send back goods imported into a Dutch port, to a port of a country which is at war on examining the ship's papers, the supposition that this could also be applied if the export from the enemy country took place on approval of the country concerned is too far fetched to be considered seriously. In such a case, the belligerent country has power by

UNNEUTRAL SERVICE.

The provisions of the Prize Code, arts. 48-56, relating to unneutral service, were originally identical with those contained in the Declaration of London, arts. 45 and 46. A sweeping modification was made by the Ordinance of July 16, 1917,[134] which amended par. (c) of art. 55, so as to provide that a neutral vessel shall be regarded as rendering unneutral services to the enemy:

> If she is chartered by the enemy government or is navigating in the interest of enemy warfare.
>
> Unless the facts show to the contrary, a vessel shall be regarded as navigating in the interest of enemy warfare when voyaging from or to enemy territory or territory in the occupation of the enemy under charter to an enemy subject or to a person residing in an enemy country or to a person shown to have rendered services as an agent for an enemy government during the present war.

SEIZURE OF NEUTRAL CARGO ON ENEMY VESSELS.

Art. 110 of the Prize Code provides:

> In case of need, H. M. ships, and the war vessels of an allied state and captured vessels, may take portions of the cargo, equipment and stores of captured enemy vessels to supply such needs, in so far as the goods taken are not unquestionably neutral property.

In *The Indrani*,[135] bunker coal and other coal carried as cargo on an enemy vessel was taken by the captor. It was afterwards shown to be neutral property and compensation was allowed.

DESTRUCTION OF VESSEL AND CARGO.

Regarding enemy vessels, art. 112 of the Prize Code provides.

> The commander may make use of an enemy vessel captured * * * as an auxiliary vessel, or if the bringing in of the vessel appears to him to be inappropriate (*unzweckmässig*) or unsafe, to destroy the same.[136]

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refusing an export license to attain directly, and with greater certainty, the end pursued by the agreement with the Netherlands Overseas Trust. Therefore, it must be admitted that the *premier jus* on reaching Holland would have remained there.

[134]Reichsgesetzblatt (1917) 631.

[135]Hamburg Prize Court, 3rd July, 1915. See also art. 9, providing that: The commander may not, without the consent of the parties interested, requisition a vessel or goods not subject to capture or seizure, even if payment is made.

[136]See also art. 1.

There is here no question of compensation for the vessel.[137] As enemy goods on board an enemy vessel are subject to condemnation,[138] and may be destroyed,[139] there is also no question of compensation as to such cargo.

A more difficult question arises as to neutral cargo on board such vessels.[140] The leading case is *The Glitra,*[141] where the Superior Court of Prize affirming the decision of the Hamburg Prize Court[142] held that the neutral owners were not entitled to compensation.

> The question is whether in the case of the legal destruction of a hostile ship, compensation is to be made for the goods of neutrals which are lost with the ship. It is clear that an express instruction upon this point is contained neither in the Prize Code nor in the Declaration of London. But the Prize Code does not state anything about it even indirectly. The claimants seek to find such an instruction in art. 114 of the Prize Code. The judge of the lower court was right in rejecting this contention, even if his reasons are not always to be agreed with. The commander is therein instructed, before he decides upon the destruction of a ship, to consider whether the injury to be done to the enemy balances the compensation to be paid for the destruction of the innocent portion of the cargo. At the same time reference is made in brackets, amongst other things, to art. 18, which deals with the capture of hostile ships and directs what portion of the cargo is likewise liable to seizure. This indeed conveys the idea that the compiler of the Prize Code takes in art. 114 the standpoint that even in the case of the destruction of a hostile vessel indemnity is to be paid for the innocent portion of the cargo. It must also be admitted that this reference confused the holding of the lower court, if it presumed that art. 114, as well as the preceding and following regulations, refer only to the destruction of neutral ships. Nevertheless, the importance which the claimants

[137]The Glitra. Superior Court of Prize. 17th September, 1915; The Indian Prince, Superior Court of Prize, 15th April, 1916.

[138]Prize Code, arts. 18, 19.

[139]Prize Code, art. 120.

[140]Art. 120 of the Prize Code provides: If the commander releases a captured enemy vessel (see art. 112), or determines not to proceed to a capture, such portions of the cargo as are subject to seizure under articles 19 and 56 may be destroyed.

[141]17th September, 1915.

[142]29th January, 1915.

seek to attach to it cannot be given to this paragraph. Interpreted according to their contention, it would to a certain extent contradict what the Prize Code prescribes in the paragraph immediately adjoining. As is clearly shown there, the Prize Code does not prescribe that compensation is to be granted in every case for the destruction of goods not liable to seizure, since in the case of the legal destruction of a neutral ship compensation is only prescribed for the destruction at the same time of innocent goods, in so far as they are neutral goods, but not for hostile goods, which, under the protection of the neutral flag, are likewise not liable to seizure. In addition, there are also hostile vessels which are not liable to capture, and therefore are not to be seized; so that if by chance,—for instance, on account of a pardonable error—such a vessel should nevertheless be destroyed, the question might arise whether on account of the compensation to be paid for values destroyed with it, a distinction should not be made between neutral and hostile property, for which reason it might seem advisable to instruct the commanders of men-of-war to take into account such considerations as are laid down for them in art. 114. Above all, it is of paramount importance that art. 114 be not *sedes materiae,* and therefore, even supposing that the compiler of the Code was of the opinion that in the case of the legal destruction of a hostile ship, claims for compensation could be sustained for neutral goods, it would be incorrect to regard his opinion as a definitive decision of this at least doubtful, and at any rate disputed, but still open question.

As Wehberg, correctly points out, Heilfron goes too far when he wishes to give to the Prize Code the importance only of a command given by the Kaiser to the commanding officers of the navy. The Prize Code contains to a great extent substantive law. But with regard to the precise question under dispute, Heilfron's characterization is correct. This article (114) is indeed only a command to the commanders of men-of-war. The Commander-in-Chief but not the legislator speaks. He does not desire to make substantive law and does not do so.

Thus obliged to revert to the most general legal principles in connection with the general laws of war, it is absolutely evident that a claim in favor of the neutrals does not exist, if the destruction of the prize was justified by the circumstances. (Art. 112, Prize Code.)

The seizure and capture of hostile ships is an admissible act of war against other states which is sanctioned by international law. Claims for compensation either from members of hostile or neutral states cannot arise in every case. It is true that according to art. 3 of the Declaration of Paris, neutral property (which is not contraband) cannot be seized even on hostile ships. Therefore, it is not even liable to seizure if the ship is brought into port. But there can be no question of the parties interested in the cargo having a claim for compensation on account of the injury caused by the seizure of the ship, the interruption of the voyage, or the conveyance to a different destination than the one intended. There is also just as little claim for compensation if the goods themselves suffer injury in consequence of the seizure of the ship; for instance, if on account of an accident they are lost during the subsequent voyage of the prize. Since seizure is a legal act, there is no legal basis whatever upon which to found an injury to the goods, which the neutrals have, moreover, themselves caused by entrusting their property to an endangered ship. Therefore, since seizure is a legal act of war, there is no legal basis for establishing the injury to the goods, even if they are lost through an act of war directed against the ship when owing to the circumstances such an act must necessarily also be directed against the cargo.

The legal question which here arises can also arise under the conditions of land warfare. It can and frequently does happen, for instance, during the bombardment of a fortified or defended place, that the property of neutrals also suffers injury. But even in land warfare, in which private property is much more protected than in war at sea, there can be no question in such a case of a liability on the part of the belligerent states to indemnify the neutrals. Compare Article 3 of Convention IV of the Second Hague Conference; Geffcken by Heffter, Völkerrecht, Sec. 150 note 1 (incorrect, at least insufficient, *viz.*, the text by Heffter); Calvo, Droit international, IV, 2250-2252; Bonfils, Völkerrecht 1217; Bordwell, Law of War 212.

In regard particularly to the conditions of naval war, however, art. 3 of the Declaration of Paris gives protection neither in general nor specifically to neutral property against the actions of the belligerents due to the necessities of war. The purpose of art. 3 of the Declaration of Paris was to extend protection

to neutral property in an enemy ship which, under the prize law as it existed prior to the Declaration, was subject to capture. What the necessities of war demand must be allowed to take place, whether neutral property is on board the ship or not. If, according to art. 2 of the Declaration of Paris, the neutral flag protects enemy property, this does not mean, that, *vice versa,* neutral property protects the enemy ship, and protects it, indeed, not only against destruction but also in many cases against every exercise of prize law.

As far as can be seen up to the most recent time, no one has ever disputed this holding. Compare, Decision of French Conseil d'Etat of May 21, 1872, in III Dalloz, Jurisprudence générale (1871) No. 94, in the prize case of *The Ludwig and Vorwaerts*; Dupuis, Le droit de la guerre maritime, (1899) 334; de Boeck, de la propriété ennemie privée sous pavillon ennemie, § 146; Bordwell, Law of War 226; Wheaton, International Law, 4th ed., 507, § 359e; II Oppenheim, International Law 201 *et seq.*; V. Calvo, Droit international 3033, 3034; Hall, International Law, 5th ed., 717 *et seq.*

The claimants' assertion that the decision of the French Prize Court in the case of *The Ludwig and Vorwaerts* was almost universally attacked in literature, has, apart from the quotations from the recent literature (Wehberg and Schramm; the quotation from Hall, p. 187, see above, is incomprehensible) remainded unproved and must be regarded as incorrect. Only very recently, especially in Germany, has there developed the theory that generally in the case of the destruction of innocent goods the highest principle prescribes the obligation of granting compensation absolutely or in so far as innocent goods may have been destroyed, and absolutely or in so far as neutral goods may have been destroyed. Compare, Schramm, Prisenrecht 338 *et seq.*; Wehberg, Seekriegsrecht 297, notes 3 & 4, and Österr, Zeitschrift für offentliches Recht, II, 3, p. 282; Rehm, Deutsche Juristenzeitung (1915) 454.

In consequence the general obligation of granting compensation is regarded as a foregone conclusion, without giving any reason to support it, and when it is subsequently attempted to bring forward a reason, it does not, when compared with the foregoing arguments, appear convincing. Even the argument that land warfare must be confined locally to the territories of the belligerents while the ship may

> sail over the wide seas, cannot alter the finality of the latter conclusion. An enemy ship is subject to attack and eventually to defeat everywhere on the high seas in conformity with the perhaps regrettable, but nevertheless, valid state of international law. Finally, as soon as a ship enters the high seas, she becomes a portion of the territory of her state, into which the neutral having loaded his goods on board a belligerent vessel for the purpose of conveying them over the sea, has brought them of his own free will.[143]

The view announced in *The Glitra* is not opposed to the provisions of arts. 9 and 110 of the Prize Code, as these deal merely with the requisition of the cargo, not with its destruction.[144]

The decision in the Glitra case was followed in *The Indian Prince*.[145]

> The court which pronounced judgment in the Glitra case decided that if an enemy prize be legally destroyed, compensation is not due for neutral property on board the vessel and destroyed with it. This must also be maintained in regard to the counter-statements brought forward. According to general principles, a claim does not arise if the act through which the cargo was injured was not illegal, but legal, nor is any basis for a claim to compensation afforded by a positive instruction of the Prize Code. This also applies to art. 110 of the Prize Code in connection with art. 9, to which the claimants have referred. For, however correct the conclusion may be that since the captain is not entitled to take neutral property off enemy ships in order to use it, he is certainly not entitled to destroy it unused, nothing is gained for the matter which is here in question. The question here is, whether the commander is compelled by international law to refrain from sinking an enemy vessel when he has a legal right to do so, because its destruction would mean the loss of the neutral goods on board, especially if it is impossible for him to bring the vessel in. After repeated examination, the court must continue to answer this question in the negative. In this respect reference can only be made to the former decision. In particular it is incorrect to say that the former decision was based on the fact that, by shipping their goods in an enemy vessel, the shippers took the risk of capture and destruction,

[143] Accord, The Durward, Hamburg Prize Court, 3rd July, 1915.
[144] The Bowes Castle, Hamburg Prize Court, 3rd July, 1915.
[145] *Supra*, footnote 137.

> and therefore could not claim compensation. On the contrary, in taking a general view of the matter, the expression to the effect that the neutrals had the free choice whether they would entrust their goods to the enemy ship and run the risks in connection therewith, is only used in order to show that the denial of compensation is correct not only from a legal point of view, but also cannot be considered as unreasonable.
>
> The principal reason which is decisive of the case in question lies in the actual dependence of the cargo on the fate of the ship, in consequence of which the cargo has to suffer the injury resulting from an act directed against the ship legally committed according to prize law. It cannot be seen why this principle, which is generally acknowledged and placed beyond doubt by the report of the drafting committee upon Article 64 of the Declaration of London, should apply only to the capture of a ship and not to its just destruction.

In *The Indian Prince* the question was further complicated by the provisions of the treaty between the United States and Prussia.

> There remains, in consequence, only the question whether the plaintiff's claim is justified by the treaty of commerce between Prussia and the United States of North America. But this must also be answered in the negative.
>
> Having regard to the practice which has been followed on both sides not only during the present war but also in previous cases, the principles of that treaty must also apply to the relations of the German Empire to the United States. As a matter of fact, however, this treaty contains nothing in favor of the claimants.
>
> According to Article XII of the treaty of 1828, Articles XII and XIII of the former treaties of 1785 and 1799, and Article XII in the original form of 1785, are applicable. In this Article XII, the principle "Free ships make free goods" is agreed upon. While the treaties which the United States made at the same time with other states agreed upon the principle "enemy ships, enemy goods," an exception being made only for goods which were shipped before the outbreak of the war or within a certain period thereafter, the treaty with Prussia is silent on the question "enemy ships, enemy goods" and it appears doubtful from the treaty how this subject is to be understood. Prussia may have taken the

stand that neutral property should not be subject to confiscation even on enemy ships, and this might be presumed from the fact that not long afterwards the same principle was acknowledged in common law. In the negotiations with regard to the Treaty of 1785, as the claimants aptly point out, Prussia actually desired that instead of the sentence "enemy ships, enemy goods," suggested in the American draft, the opposite view, "enemy ships, free goods," be adopted. But the United States would not agree to this, and therefore nothing at all was settled upon this point. Thus the law as laid down by the treaty corresponded to the rules of the Armed Neutrality of 1780. Only the rule "free ships, free goods" is expressed in the treaty, while nothing is said about neutral goods on enemy ships. This has often been taken to mean that the confiscation of neutral goods on enemy ships would not be resisted. By long practice it had become the custom to consider the confiscation of neutral goods on board enemy ships as a concession to the belligerents, in return for which the inviolability of enemy goods on neutral ships is acknowledged.

This is precisely the standpoint which the authorities of the United States of North America took at the time of the celebration of the treaty of 1785 with regard to its interpretation. No less a person than the Secretary of State, Jefferson, who was himself interested in the conclusion of the Treaty of 1785, expressed himself in this sense when, in 1793, France, then at war with England, complained to the United States that England had captured French goods in American ships and that America had allowed it. In Jefferson's note of July 24, 1793, rejecting these complaints as unfounded, because according to international law *(Consolato del Mare)* enemy goods in neutral ships are subject to confiscation, which is only modified if the principle, "free ships, free goods" is provided by the treaty, it is stated:

"We have adopted this modification in our treaties with France, The Netherlands and *Prussia,* and therefore as to them, our vessels cover the goods of their enemies, *and we lose our goods, when in the vessels of their enemies.*"

Although in the treaty with Prussia the principle "Free ships, free goods" only is agreed upon, the Secretary of State, Jefferson, immediately presumes that, in consequence, the principle "enemy ships,

enemy goods" also applies in the relations with Prussia.

The claimants, therefore, do not refer to Article XII, but to Article XIII of the Treaty of 1785 and 1799. They do not deny that if the French text be used, nothing can be gained for their point of view from this article. But they want to hold to the English text, in which a discrepancy occurs, from which they seek to infer that under all circumstances when the goods belonging to citizens of the United States of America are in question, even if the cargo be on board an enemy ship, compensation must be paid.

It is unnecessary to consider which of the two texts is competent, or how, if both are competent, a contradiction between them is to be solved, for even the English text leads to no favorable result for the claimants. In the first place, their reading is directly contradicted by the interpretation of the treaty adopted by the United States, as mentioned above, in the year 1793. But purely from a grammatical point of view, the reading of the English text adopted by the claimants is not admissible. Whilst the French text speaks of goods shipped *"à bord des vaisseaux des sujets ou citoyens de l'une des Parties,"* the English text does not read, as it should in a literal translation, "carried in the vessels of the subjects or citizens of either party," but reads *"carried in the vessels or by the subjects or citizens of either party."* Accordingly, the claimants think that not only goods shipped on American or Prussian vessels, but goods shipped by American or Prussian citizens as well, regardless of what kind of vessels are employed, or even if they be shipped in enemy vessels, should be presumed to be synonymous with goods which *belong* to such citizens.

Of the latter goods, however, no mention is made in the treaty. The "carried by" does not refer to the property relationship but to the *person* who undertakes the shipment, who, however, is the shipowner and not the shipper or consignee. The whole difference between the English and French texts amounts to the extension, that, in addition to the ships of the citizens of both states, special stress is laid in the English text on the vessels of the parties to the contract, the vessels of the states,—"the vessels of either party"; for the words "of either party" must refer to "in the vessels" if the latter expression is not to be totally unintelligible. It is charac-

teristic, that the text in Martens, Recueil des Traites, Supplement, II, p. 226, also contains the edition of the treaty furnished by the Interior Department and an independent translation from the English which was undoubtedly made soon after the conclusion of the treaty of 1799, in which the translator reproduces the wording exactly in this sense. The "elles même" in the turning on "d'elles même" can for grammatical reasons apply only to the "Parties contractantes" in whose own vessels goods are shipped.

Moreover, a different interpretation is impossible for positive reasons. Article XIII treats of contraband. In order to avoid disputes, which are likely to arise over the question whether goods are contraband of war or not, it was agreed that contraband likewise should not be subject to seizure. It is true that in case of necessity, contraband goods may be requisitioned upon payment of their value; they may also, should the necessities of war demand it, be detained for the time being, the owners to be paid for the damage sustained by the detention. These stipulations of Article XIII are mostly closely connected with the provisions of Article XII. While contraband is always excepted from the general principle "free ships make free goods," after that principle is laid down in Article XII for enemy goods in Prussian or American vessels, Article XIII enters into the exceptional case of goods shipped in such vessels which are contraband of war or suspected of being contraband. The provision concerning the treatment of the ships in question, according to which the master of a vessel stopped for carrying contraband to the enemy is to have the choice of delivering up the contraband articles and then proceeding unmolested upon his voyage, applies without doubt only to the ships of the parties to the treaty. It appears absolutely out of the question that the agreement was also meant to apply to an enemy ship carrying munitions, *etc.*, to its own belligerent country. It cannot have been considered that the belligerent who succeeded in capturing a ship with weapons and munitions should be obliged to pay compensation when it happened to be a citizen of the other state party to the treaty who undertook to send them to the enemy, or that the enemy vessel after it had given up the contraband should be allowed to continue its voyage unmolested.

If Article XIII of the Treaty of 1799 does not refer to contraband on enemy ships, it is self-evident

> that nothing concerning the treatment of innocent goods on such vessels is laid down. The principle "enemy ships, free goods," applies also to the United States. Its validity, however, is not derived from any special treaty, but from common international law as laid down in the Declaration respecting Maritime Law adopted at Paris in 1856, which, according to the German Prize Code applies also to countries, like the United States, which did not agree to that Declaration. Likewise, in regard to the question whether in such cases as the one under consideration the owners of neutral goods are to receive compensation, the same principles must be applied towards the citizens of the United States as towards the subjects of other neutral countries. These principles are laid down in the Glitra case.[146]

Kohler[147] denies all liability for the destruction of neutral goods on board an enemy vessel sunk within the war zone, but admits that in so far as the neutral property is not destroyed it must be restored.[148] The same view is expressed by Scholz[149] and by Strupp.[150]

Nöldeke[151] points out that neither the precedents nor the general principles of international law require compensation to be made. He states:

> Such an obligation can at most arise only where the war vessel destroying the enemy vessel and the neutral cargo is guilty of a violation of law. The law of nations does not recognize the existence of a general principle that a state is responsible in damages where in the exercise of its rights it incidentally affects private rights. The provision of art. 53 of the Declaration of London which provides that in the case of the destruction of neutral ships, a liability for the payment of compensation of neutral cargo de-

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[146]Accord: The Indrani, Hamburg Prize Court, 3rd July, 1915.

[147]Der Lusitaniafall in Lichte des Völkerrechts, Deutsche Juristen Zeitung (1915) 538, 540. See also his article, Der Lusitania-Fall, in 9 Zeitschrift für Völkerrecht 179.

[148]But no damages are recoverable for delay or for damage to perishable goods. Scholz, Schadenersatz für Zerstörung von Prisen, Deutsche Juristen Zeitung (1915) 765, 768.

[149]*Op. cit.*, 765, 768.

[150]Der Lusitania-Fall, 93-96. So also, Arndt, Berliner Tageblatt, 18th May, 1915. (evening ed.)

[151]Die Frage des Schadenersatzes für die Zerstörung neutraler Ladung mit feindlichen Schiff, 9 Zeitschrift für Völkerrecht 447, 453, 454. See also his article in Hamburger Fremdenblatt, 8th June, 1915. (evening ed.)

> stroyed with the ship, arises without regard to the guilt of the war vessel, is an exceptional provision not susceptible of extensive interpretation by analogy * * *.

In reference to the provisions of the Declaration of Paris, Nöldeke says:

> It must be taken into consideration that in 1856 the value of the cargo seized was the principal point at interest in the law of prize. The purpose of art. 3 was to prevent the enrichment of the belligerents at the cost of neutrals but not at the cost of the opposing belligerents. Therefore, the acquisition (*Aneignung*)[152] of neutral goods was prohibited and the duty imposed upon the belligerent to pay over the proceeds of neutral goods sold by him to the interested persons. Under no circumstances was it intended thereby to interfere with military operations nor to require the belligerent to abstain from the sinking of an enemy ship where such sinking was a military necessity, by requiring him to have regard to the neutral character of a part or of the entire cargo. Furthermore, the Declaration of Paris does not prohibit an injury of neutral goods. From this viewpoint, therefore, no question can arise of the existence of a general rule granting immunity to neutral goods on board an enemy vessel. From this it follows further that a destruction of the cargo is permissible in all cases where the vessel itself may be destroyed, because a separation of the goods from the ship is impossible at that critical moment.

Heilfron[153] is of opinion that art. 114 of the Prize Code can give no right of compensation, because the entire Code is merely a set of instructions to naval commanders, issued by the Emperor in his quality as commander in chief,[154] and therefore incapable of imposing a liability on the state. He further argues that the Declaration of Paris, while protecting neutral goods in enemy vessels from seizure, does not protect them from destruction with the vessel.

Other German writers, such as Wehberg,[155] Schramm,[156]

[152]La marchandise neutre * * * n'est pas. *saisissable* sous pavillon ennemi.

[153]Lusitania, Juristische Wochenschrift (1915) 486.

[154]As already pointed out in this article, this is not in accord with the prevailing view.

[155]Seekriegsrecht 295; Recht (1915) 280; Oesterr. Zeitschrift für öffentiche und private Versicherung (1914-15) 530.

[156]Prisenrecht 510.

Hirschmann,[157] Rehm,[158] impose a liability for neutral cargo destroyed by the captor.

According to the last-mentioned writer, there is a liability to pay compensation for such cargo, both under the principles of international law and under the Prize Code. He also rejects the distinction made by the French courts to the effect that where the destruction of the enemy vessel took place for military reasons (as in the case of *The Désaix*) no compensation is due. But where the enemy vessel is sunk while offering armed resistance or actively participating in hostilities he states that no compensation is payable.[159] But mere presence in the war zone is not sufficient in his view to take away the right to compensation.[160]

Somewhat different questions arise in the case of the destruction of neutral prizes.[161] This matter was considered at great length at the Second Hague Peace Conference in 1907, but no decision was reached; and the question came up again at the London Naval Conference in 1909, where the rules were embodied in arts. 48-54 of the Declaration of London.

Art. 113 of the Prize Code provides:

> Where a neutral vessel has been captured under the circumstances set forth in art. 39 for carrying contraband, or in arts. 77 and 78, for breach of blockade, or in art. 51, for rendering unneutral services, the commander may destroy the same,[162] provided that:
>
> a. the vessel is subject to condemnation (*cf.* arts. 41, 51, and 80), and, in addition thereto,
>
> b. the bringing into port would subject the war vessel to danger, or be liable to impede the success of the operations in which it is at the time engaged. Among other circumstances this may, *inter alia*, be assumed to be the case, if:

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[157]Internationales Prisenrecht 123.

[158]Neue Fragen des deutsch-englischen Seekrieges; in Deutsche Juristen Zeitung (1915) 454. See also his article, Der Unterseebootkrieg, 9 Zeitschrift für Völkerrecht 20, 36.

[159]This is in accord with the English view but opposed to the American cases.

[160]For a contrary view on this point, see von Zorn in Der Tag, 17th March, 1915.

[161]See, Huberich, The Destruction of Neutral Prizes and the German Prize Code, 10 Illinois Law Review 5-10; Speyer and Huberich, De Medea, Weekblad van het Recht, No. 9759.

[162]The destruction of a vessel need not be determined upon by the commander in person. The decision may be left to a subordinate officer. The Tello, Hamburg Prize Court, 11th December, 1915. Appeal dismissed, 29th June, 1916.

(1.) the vessel, on account of its defective condition or by reason of deficiency of supplies, cannot be brought into port; or

(2.) the vessel cannot follow the war vessel, and is therefore liable to recapture; or

(3.) the proximity of the enemy forces gives ground for a fear of recapture; or

(4.) the war vessel is not in a position to furnish an adequate prize crew.

Art. 114 provides that in determining whether a neutral ship is to be destroyed, the captor must consider whether the damage to the enemy will outweigh the damages payable in respect of that part of the cargo which is not subject to condemnation. In all cases of doubt, a vessel not capable of being brought into port for adjudication should be released.[163] Where a neutral vessel is destroyed, and it is held by the prize court that the circumstances mentioned in article 113 (b) were not present, compensation must be made for the ship and cargo, regardless of whether these were subject to condemnation or not. If it be found that the ship or cargo destroyed were not liable to condemnation there is a similar right to compensation.[164]

The best known cases under this head are *The William P. Frye* and *The Medea.* The former was an American,—and at the time a neutral—vessel sunk by a German cruiser.[165] The Dutch steamer Medea was sunk by a German submarine while engaged in the carrying of contraband. In the Medea case it was held by the Hamburg Prize Court[166] that compensation must be paid for neutral cargo, not contraband, destroyed with the vessel.

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[163]Prize Code, art. 119.

[164]Prize Code, art. 115.

[165]The incident gave rise to an extended diplomatic correspondence, set forth in Department of State, Diplomatic Correspondence with Belligerent Governments, No. 1, pp. 85, 86; No. 2, pp. 185-189; No. 3, pp. 311-318.

[166]13th August, 1915.

APPENDIX.

AMENDED CONTRABAND LISTS.[167]

ABSOLUTE CONTRABAND.

1. Arms of all kinds, including arms for sporting purposes, their component parts, as well as semi-manufactured articles which can be used in their manufacture.

2. Projectiles, cartouches and cartridges of all kinds, their component parts, as well as semi-manufactured articles which can be used for their manufacture.

3. Gunpowder and explosives of all kinds, smoke-producing and illuminating substances, incendiary matter, implements and substances for fighting with gas, and materials which can be used for their manufacture, including: nitric acid and nitrates of all kinds; ammonia, ammonia liquor, ammonium chloride, ammonium salts; sulphur, sulphur dioxide, sulphite and thiosulphite, sulphuric acid, fuming sulphuric acid (oleum), carbon bisulphide; acetic acid, acetates, for example, acetate of calcium; acetic ether, formic acid and formic acid salts, formic ether, sulphuric ether; acetone; ethyl and methyl alcohol, spirit, sulphite spirit, crude wood spirit, alcohol of all sorts and its derivatives, as well as the products thereof; urea; resin, resinous products, camphor and turpentine (oil and spirit); carbide of calcium; cyanamide and its compounds; phosphorus and its compounds; chlorates and perchlorates of sodium, barium and calcium; chlorine, chlorhydrin; bromine; phosgene (carbonyl-chloride); stannic chloride; mercury; asphalt; mineral pitch; pitch; tar, including wood-tar, wood-tar oil; benzol, toluol, xylol, solvent naphtha, phenol (carbolic acid), cresol, naphthalene and their mixtures and derivatives; aniline and its derivatives; glycerine; dioxide of manganese; oxalic acid and oxalic acid salts; paper and cardboard of every kind and in every form, and the refuse thereof; wood-pulp and cellulose.

4. Cannon barrels, gun mountings; limbers, munition wagons, field kitchens and bakeries, supply wagons, field forges, searchlights, searchlight accessories and their component parts.

5. Range-finders and their component parts.

6. Binoculars, telescopes, chronometers, nautical and artillery instruments of all kinds.

7. Clothing and equipments of a recognizably military character.

8. Saddle, draught and pack animals, suitable at present or in the future for use in war.

9. All kinds of harness of a distinctively military character.

10. Articles of camp equipment and their component parts.

11. Armor plates.

12. Steel and iron wire; barbed wire, as well as implements for fixing and cutting the same.

13. Sheets, tinned or galvanised.

14. Warships and other vessels of war, as well as component parts of such a nature that they can be used only on a vessel of war; ship plates and ship construction steel.

15. Submarine sound-signalling apparatus.

16. Airships and aeroplanes of all kinds and their component parts, together with accessories, articles and materials for use in connection with aerial navigation; goldbeaters' skin.

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[167]As set forth in the Ordinance of 25th June, 1917, [Reichsgesetzblatt (1917) 554], as amended by the Ordinance of 18th January, 1918, [Reichsgesetzblatt (1918) 43]. The translation follows that prepared by the British Foreign Office and published in the London Gazette, 7th August, 1917.

17. Photographic articles.

18. Tools and appliances designed exclusively for the manufacture and repair of arms and war material.

19. Lathes, machinery and tools used in the manufacture of munitions of war.

20. Electrical articles designed for use in war, and their constituent parts.

21. Mining timber, including undressed and partly dressed timber for mining purposes, rattan, bamboo, cork, including cork flour.

22. Coal and coke, including pitch coke and petrol coke.

23. Flax, hemp, jute, ramie, esparto grass, cocoanut fibre, kapok, vegetable fibres and yarns and rope-strands made therefrom.

24. Wool and animal hair of all sorts; the same in its various stages of manufacture up to and including yarn, and the waste products of manufacture.

25. Raw cotton, linters, cotton waste, cotton yarns, cotton goods, rags, waste, and artificial cotton.

26. Barrels and tanks of all kinds and their component parts.

27. Gold, silver, paper money, securities, negotiable trade papers, every kind of check, draft, order of payment, dividend coupons, interest and annuity certificates, letters of credit, of transfer and of advice, notifications of credit and debit or other documents which, whether in themselves or on completion or by virtue of any operation on the part of the recipient, empower, confirm or effect the transfer of sums of money, credits or securities.

28. Rubber tires for motor vehicles, as well as all articles and materials used specially in manufacturing or repairing rubber tires.

29. Rubber (including crude rubber, waste rubber, reclaimed rubber, rubber solution, rubber cement, or any other preparation containing rubber), balata and gutta percha, as well as the following kinds of rubber, viz.: Borneo, Guayule, Jelutong, Palembang, and all other materials containing rubber; besides articles which are made in whole or in part of rubber.

30. Mineral oils (including shale oils, petroleum, benzine, naphtha, gasoline).

31. Lubricants.

32. Tanning material of all kinds, including quebracho wood and the extracts used in tanning.

33. Hides of cattle, buffaloes and horses; hides of calves, pigs, goats and wild animals; and leather dressed or undressed, if suitable for use in saddlery, harness, military boots and military clothing; beltings, hydraulic leather and pump leather.

34. The following ores: Tungsten ores, molybdenite, manganese ore, nickel ore, chrome ore, zinc ore, lead ore, hematite iron ore, pyrites (crude and calcined), copper ores, cadmium ore, vanadium ore and cobalt ore.

35. Aluminum, its alloys and compounds; argillaceous earth, bauxite.

36. Arsenic and antimony, and their compounds.

37. Felspar, borax, boracic acid and other boric compounds, borax-bearing earths and minerals (borax-lime and boraxite).

38. The following metals: Tungsten, molybdenum, vanadium, nickel, selenium, cobalt, haematite pig iron, manganese and its alloys, copper and its alloys, tin, lead, zinc, cadmium and its alloys; zirconium, cerium, thorium and their alloys and compounds; oxide of zirconium, monazite sand; platinum, osmium, ruthenium, rhodium, palladium, iridium and their alloys and compounds.

39. Alloys of iron (ferro compounds), including tungsten, manganese, vanadium and chrome iron.

40. Insulating material, raw and manufactured.

41. Silk of all kinds and silk stuffs; silk cocoons; artificial silk and goods made therefrom.

42. All kinds of wax; sebacic acid.

43. Quillaya bark.

44. Talc, emery, corundum, carborundum and all other polishing materials, natural and artificial, and articles, prepared therefrom. Diamonds for industrial purposes.

45. Albumen.

46. Glass and glass articles of every kind. All kinds of bottles.

47. Lime, chalk, chloride of lime, lead powder, soda and caustic soda.

48. Strontium and barium salts.

49. Bone charcoal.

50. Graphite of all sorts, whether in lumps or ground; graphite crucibles and the shards thereof, Atcheson's graphite, electrodes and fragments thereof.

In the interpretation of these provisions relating to absolute contraband, it has been held that the term "explosives" as used in subsection 3, includes not alone such objects as are immediately available as explosives in the condition in which they are at the time of the seizure, but also materials which can after a not too difficult or expensive process, be utilized as such. It was accordingly held that esparto grass, although not specifically on the list of absolute contraband at the time of the seizure, should, in view of its possible use in the manufacture of explosives, be regarded as absolute contraband. The Jeanne, Hamburg Prize Court, 6th July, 1917. The words "ship plates and ship construction steel" as used in subsection 14 include all steel materials or materials in the nature of steel, suitable for shipbuilding. The Braga, Kiel Prize Court, 22nd August, 1916. The component parts and accessory machines of lathes (subsection 19) are absolute contraband. The Dania, Kiel Prize Court, 5th December, 1915; The Artemis, Kiel Prize Court, 6th October and 24th November, 1915. The same applies to hydraulic presses designed for the manufacture of munitions. The Heini, Superior Court of Prize, 6th October, 1916; and to razors addressed to the Royal Army Clothing Department. Hamburg Prize Court, 13th August, 1915.

CONDITIONAL CONTRABAND.

1. Foodstuffs.

2. Forage and all kinds of feeding stuffs for animals; oil seeds, nuts and kernels; animal, fish and vegetable oils and fats, excluding those suitable as lubricants, and not including volatile oils; yeast.

3. The following articles, if suitable for use in war: articles of clothing, fabrics for clothing, footgear, skins and furs which can be used for clothing, boots and shoes.

4. Vehicles of all kinds and their component parts, as well as accessories (especially all motor vehicles), suitable for use in war.

5. Railway materials, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs and telephones.

6. Fuel, exclusive of coals, coke and mineral oils.

7. Horseshoes and shoeing materials.

8. Harness and saddlery.

9. Ships, boats and floating craft of all kinds, floating docks and appliances for dry docks, as well as their component parts.

10. Cement.

11. All kinds of timber, rough or worked (especially hewn, sawn, planed, grooved), excepting mining timber, etc. [See item 21, under absolute contraband.]

12. Sponges, raw or prepared.

13. Glue, gelatine and materials used in their manufacture.

14. Soap.

15. Paint for ships' hulls.

16. Lac.

17. Copper vitriol.

18. Lathes and such machines and tools as are used principally for the manufacture and repair of arms and war material.

In interpreting subsection 1, it has been held that the term "foodstuffs" applies to oranges and mandarines, The Medea, Hamburg Prize Court, 13th August, 1915, lemons, The Iyden, Kiel Prize Court, 15th December, 1915, *premier jus,* The Lestris, Superior Court of Prize, 8th January, 1918, and to onions—at least in large quantities, The Luise, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915. The same was held as to chocolates and sweets, where some of the packages bore the words "for our soldiers." The Zaanstroom, Hamburg Prize Court, 1st June, 1915. But grapes, pears, and cauliflower are not contraband. The Luise, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915. Motorcycles, The Tor, Kiel Prize Court, 12th August, 1915, and bicycle parts, The Luise, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915, come within subsection 4. Matches are "fuel" within subsection 6. The Thorsten II, Kiel Prize Court, 12th September, 1916. Ship motors are within subsection 9. The Luise, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915. But small electromotors used for propelling table fans and sewing machines on board a vessel are not component parts of a vessel, within subsection 9. Not all objects that may be used on board vessels are necessarily within this category. Objects that are capable of use on land are not contraband, unless it be shown that they were specially designed for use on board vessels. The John Wilson, Superior Court of Prize, 24th May, 1917. Sawn fir sleepers come within subsection 5. The Grenland, Superior Court of Prize, 6th October, 1916. Building Timber is within subsection 11, The Laila, Hamburg Prize Court, 4th November, 1915; The Belle Ile, Superior Court of Prize, 6th July, 1915; The Elida, Superior Court of Prize, 18th May, 1915. Sawn boards and staves. The Gefion, Superior Court of Prize, 18th June, 1915. Whale oil is within subsection 2. The Sigurd Hund, Hamburg Prize Court, 4th November, 1915. But is now absolute contraband. The Thor II, Hamburg Prize Court, 16th November, 1917. But steel for umbrellas is not contraband. The Crimdon, Kiel Prize Court, 6th January, 1915. It has also been held that wood fibre to be used for the manufacture of paper is not contraband. The Crimdon, Kiel Prize Court, 6th January, 1915. But this is now obsolete, as this material is declared absolute contraband by the Ordinance of 18th January, 1918. Plants are not contraband. The Harald Haarfager, Kiel Prize Court, 4th July, 1917.

ARTICLES THAT MAY NOT BE DECLARED CONTRABAND.

1. Hops.

2. Horns, bones and ivory.

3. Natural and artificial fertilizers in so far as specified substances have not already been expressly declared contraband.

4. Earths, stones including marble, bricks, slates and roofing tiles.

5. [Repealed 18th January, 1918.]

6. Colours, including the materials exclusively used for their manufacture, with the exception of paint for ships' hulls; varnish.

7. Sulphate of soda in cakes.

8. Machinery specially adapted for agriculture and for printing.

9. Precious stones, excepting diamonds used for industrial purposes [see art. 21, under (44)]; semi-precious stones, pearls, mother of pearl and corals.

10. Steeple and wall clocks, timepieces and watches, excepting chronometers.

11. Fashion and fancy goods.

12. Feathers of all kinds.

13. Articles of domestic furniture, and decorative articles for domestic purposes; office furniture and appliances.